89-1272

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

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AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,
Petitioners,
v.
SAMUEL K. SKINNER,
Secretary of Transportation,
Respondent.

———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Does the Department of Transportation's "Drug-Free Departmental Workplace" program violate the Fourth Amendment's prohibition against unreasonable searches and seizures, insofar as that program requires thousands of the Department's employees, as a condition of their continued employment, to submit to a permanent regime of suspicionless, random, unannounced, repeated and closely-monitored urine collection drug testing?

LIST OF PARTIES TO THE PROCEEDING

The petitioners in this proceeding, and in the proceedings below, are the American Federation of Government Employees, AFL-CIO, ("AFGE"), AFGE Local 3313, AFGE Local 2814, Caleb Butler, and James Dawkins. The respondent in this proceeding, and below, is Samuel K. Skinner, Secretary of Transportation, in his official capacity. There are no other parties.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, American Federation of Government Employees, *et al.*, plaintiffs in the district court and appellants in the court of appeals, respectfully petition this Court to issue a writ of *certiorari* to the United States Court of Appeals for the District of Columbia Circuit to review the decision and judgment in *AFGE v. Skinner*, 885 F.2d 884 (D.C. Cir. No. 87-5417; September 8, 1989).

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 885 F.2d 884 and is reprinted in the separate appendix to this petition ("Pet. App.") at 1a-28a. The memorandum and order of the District Court for the District of Columbia is reported at 670 F.Supp. 445 and is reprinted at Pet. App. 29a-37a.

JURISDICTION

The judgment of the court of appeals was issued on September 8, 1989. On November 28, 1989, the time for filing a petition for a writ of *certiorari* was extended by the Chief Justice to and including January 8, 1990. On December 28, 1989, the time for filing a petition for a writ of *certiorari* was further extended by the Chief Justice to and including February 7, 1990. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution states as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

United States Department of Transportation ("DOT") Order 3910.1, entitled "Drug-Free Departmental Workplace" and dated June 29, 1987, is reprinted at Pet. App. 38a-95a.

STATEMENT OF THE CASE

A. Statement of Facts

On September 15, 1986, then President Reagan signed Executive Order 12564, 51 Fed. Reg. 32889 (September 17, 1986), which directs executive-branch agencies to establish programs to test federal employees in "sensitive positions" for the use of illegal drugs. The Executive Order does not specifically direct agencies to require "random" or "unannounced" urine collection drug tests; rather, that Order generally left the "criteria for [drug]

testing" and the "extent" of such testing up to the discretion of each agency's head.

On June 29, 1987, pursuant to this Executive Order, then-Secretary of Transportation Dole adopted DOT Order 3910.1, a highly detailed plan mandating that the DOT's approximately 62,000 employees undergo various forms of urine collection drug testing. Among the "types of testing" mandated by Order 3910.1 is a requirement of "random testing" which applies to approximately 30,000 DOT employees, who, in the DOT's view, are "safety [or] security critical." Pet. App. 52a.[1]

Pursuant to this random testing requirement, each of these 30,000 DOT employees is subject to a new and permanent regime of monitored urine collection drug testing conducted on an entirely *random, unannounced and repetitive* basis.[2] Any covered employee who does not

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[1] DOT's drug-testing program also requires a variety of other "types of testing," which include: (1) "periodic testing," under which employees who are otherwise required to undergo periodic medical exams must include a drug test in the exams; (2) "reasonable suspicion testing," under which employees can be tested when management has reasonable cause to suspect use of illegal drugs; (3) "pre-employment/pre-appointment testing," under which applicants to certain positions must be tested prior to beginning in those positions; (4) "accident or unsafe practice testing," under which employees must be tested whenever their behavior may have caused an accident or safety violation; and (5) "follow-up testing," under which employees who have previously been temporarily removed from their positions for illegal drug use must be tested after completing a rehabilitation program and returning to service. Pet. App. 53a-54a.

[2] The wide variety of job categories covered by the DOT random testing plan includes the following: "motor vehicle operators; criminal investigators; vessel traffic controllers; air traffic controllers; mechanics (general, maintenance, electronic, instrument, aircraft oxygen equipment, aircraft engine); aircraft electricians; inspectors (metals, aviation, railroad safety series); transportation equipment operation family; pilots (master, inspection/flight test); civil aviation security specialists, safety specialists (highway, motor

fully comply and cooperate with a random and surprise demand to report immediately for a monitored urine collection session—in which the employee's moment-to-moment actions are rigorously controlled, *see infra* n.11, p.11—is subject to being terminated from federal employment. Pet. App. 71a.

The DOT's random testing requirement is *not* based on any evidence that drug abuse by employees in the covered positions has ever caused any significant accident. Nor is there any evidence of any extensive drug abuse by such employees. On September 7, 1987, the DOT testing plan set out in Order 3910.1 went into effect.[3] Subsequent test results confirm that the level of drug use among those employees covered by the random testing requirement is exceedingly low.[4]

B. Statement of Proceedings Below

On July 7, 1987, this action challenging the constitutionality of the DOT random drug testing program and seeking declaratory and injunctive relief was filed in the

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carrier, railroad, safety engineer); engineers (general, civil, mechanical, electrical, chemical); firefighters; nurses; shipwright foremen; chief engineers (ferryboat); oiler (ferryboat and diesel); electronics technicians; industrial hygienists; transportation specialists; lock and dam operators". Pet. App. 10a n.8.

The DOT asserts that each of these positions bears "a direct and immediate impact on public health and safety, the protection of life and property, law enforcement, or national security." Pet. App. 52a.

[3] Procedures for the operation of the testing program are also governed by the Department of Health and Human Services ("HHS") guidelines which were issued subsequent to the effective date of the DOT program to govern all federal workplace drug testing. *See*, HHS, *Guidelines for Federal Workplace Drug Testing Programs*, 53 Fed. Reg. 11,970 (April 11, 1988) ("HHS Guidelines").

[4] From January 1, 1988 to April 30, 1989, the DOT conducted 15,352 random tests and 39 of these tests produced positive results (0.6%), with evidence of marijuana use accounting for two thirds of the positive results. DOT, *Drug-Free Workplace Program Evaluation Report* (September 1989) at 16.

United States District Court for the District of Columbia. The plaintiffs (petitioners in this Court)—labor organizations representing DOT employees covered by the random program and two individual covered employees—contended both that the overall program constitutes an unreasonable search and seizure in violation of the Fourth Amendment, and, in the alternative, that the program is unconstitutional in its coverage of employees whose job positions are not, in fact, in sufficiently safety- or security-critical jobs to justify their inclusion.[5]

The Government filed an answer on July 15, 1987, and a motion for summary judgment on July 30, 1987. On August 21, 1987, petitioners filed a motion for a preliminary injunction with their response to the Government's summary judgment motion. District Judge Gesell, in an order dated September 30, 1987, accompanied by a brief opinion, granted the Government's motion for summary judgment and denied petitioners' motion for a preliminary injunction because "on balance, the preponderance of the proof supports the reasonableness of the random plan." Pet. App. 36a.[6]

The petitioners appealed to the United States Court of Appeals for the District of Columbia Circuit. Prior to a decision on that appeal, this Court issued its decisions in *Skinner v. Railway Labor Executives' Association*, —— U.S. ——, 57 L.W. 4324 (March 21, 1989) and *National*

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[5] Specifically, petitioners contended that the positions of motor vehicle operators, Federal Railroad Administration ("FRA") hazardous materials inspector, and Federal Aviation Administration ("FAA") aircraft mechanic, are not sufficient safety- or security-sensitive jobs to justify their inclusion in the random testing program.

[6] Although the district court granted summary judgment on the claim that certain specified job categories are insufficiently sensitive for inclusion in the random testing plan, that court also noted that at this stage of the litigation, the evidence on these jobs was "sparse". Accordingly, that court specified that its decision would not preclude "later, more specific challenge[s] clearly directed to a [specific] job category." Pet. App. 36a.

Treasury Employees Union v. von Raab, —— U.S. ——, 57 L.W. 4338 (March 21, 1989). In *Skinner*, the Court upheld a program of post-accident drug testing of railway workers, and, in *von Raab*, the Court upheld a program of pre-employment drug testing of customs agents. Based on *Skinner* and *von Raab*, the court of appeals affirmed the district court's decision in this case.

Although *Skinner* and *von Raab* did *not* involve any program of random, unannounced and repetitive drug testing, Judge Sentelle, writing for the court of appeals, concluded that no legal difference between random testing and other types of testing "compels 'a fundamentally different analysis from that pursued'" in *Skinner* and *von Raab*. Pet. App. 13a (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 489 (D.C. Cir. 1989)). In random drug testing cases, said the court below, "[t]he balance we strike [between privacy interests and public needs] is substantially identical to that struck by the Supreme Court in *Skinner*." Pet. App. 10a. Affirmance of the district court was thus justified, Judge Sentelle concluded, because, although "random testing may increase employee anxiety and invasion of subjective expectations of privacy," such testing "also limits discretion in the selection process and presumably enhances drug-use deterrence."[7] Pet. App. 13a.

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[7] The court of appeals also rejected petitioners' contentions regarding the inclusion of specific job categories in the random program. Pet. App. 14a-18a. We do not seek review of that ruling in this petition.

REASONS FOR GRANTING THE WRIT

The question presented by this *certiorari* petition—the constitutionality of a government requirement that certain employees, as a condition of employment, submit to a permanent regime of suspicionless, unannounced, random, repetitive and closely-monitored urine collection drug testing—is of the first magnitude.

Very simply stated, such suspicionless testing programs work *far deeper and far more pervasive intrusions into personal privacy and dignity than any suspicionless searches this Court has ever validated. See infra* at pp. 9-14. Nonetheless, all levels of government are increasingly mandating such programs. In the federal sector alone, over 345,000 federal employees are now subject to such tesitng programs.[8] The DOT, in addition, requires almost 4 million private sector employees in the commercial transportation industries to submit to random drug testing regimes quite similar to the regime at issue here.[9]

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[8] *See* Havermann, *U.S. Details Plans For Drug Tests*, Washington Post (May 4, 1988) at A1 (over 345,000 federal employees subject to random testing); *see also* Office of Workplace Initiative, National Institute on Drug Abuse, *Report to Congress: Federal Agency Drug-Free Workplace Programs, Tier I Agencies* (March 29, 1988).

[9] For the DOT requirements, see BNA, National Report on Substance Abuse (November 23, 1988) at 1 (approximately 3,864,500 private sector transportation employees subject to random testing). *See also* DOT, Coast Guard, *Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel*, 53 Fed. Reg. 47064 (November 21, 1988) (requiring random drug testing of employees in commercial maritime industry); DOT, Federal Aviation Administration, *Anti-Drug Program for Personnel Engaged in Specified Aviation Activities*, 53 Fed. Reg. 47024 (November 21, 1988) (requiring random drug testing of employees in commercial aviation industry); DOT Federal Highway Administration, *Controlled Substance Testing*, 53 Fed. Reg. 47134 (November 21, 1988) (requiring random drug testing of employees in motor carriage industry); DOT Federal Railroad Administration, *Random Drug Testings; Amendments to Alcohol/Drug Regulations*, 53 Fed. Reg. 47102 (November 21, 1988) (requiring random drug testing of employees

And these employees are only a fraction of the total number being subjected to random urine collection requirements.[10]

By any fair measure, then, these recently instituted government drug testing programs constitute a radical expansion of government power over the individual. Yet the courts of appeals have been validating these programs *without any close judicial examination* of the unique Fourth Amendment issues that such suspicionless, unannounced, random, and repetitive searches pose. In so doing those courts, including the court below, have simply assumed—or have simply asserted—that this Court's decisions in *Skinner v. Railway Labor Executives' Association*, *supra*, and *National Treasury Employees Union v. von Raab*, *supra*, dispositively settle the constitutionality of *random* drug testing programs.

But *Skinner* and *von Raab* did *not* concern comparable testing programs and there is *nothing* in this Court's opinions squarely confronting the sensitive and difficult legal issues posed here. Thus, these massive and unique programs, which govern the working lives of millions, are

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in railroad industry); DOT, Research and Special Programs Administration, *Control of Drug Use in Natural Gas, Liquified Natural Gas and Hazardous Liquid Pipeline Operations*, 53 Fed. Reg. 47084 (November 21, 1988) (requiring random drug testing of employees in pipeline industry).

[10] The Department of Defense, for example, requires that a large number of the employees of private defense contractors be subjected to random drug testing regimes. *See* Department of Defense, *Federal Acquisitions Regulation Supplement; Drug-Free Work Force*, 53 Fed. Reg. 37763 (September 28, 1988), supplemented by *Questions and Answers Prepared by Defense Department on Drug Free Workplace Regulations for Federal Contractors*, BNA Daily Labor Report (April 10, 1989) at G-1 (requiring random drug testing of employees of defense contractors).

In addition, as the litigated cases indicate, hundreds of state and local governments impose random drug testing requirements on their employees.

being approved and enforced without ever being subjected to serious judicial analysis.

In large part the legitimacy—and the moral force—of judicial review rests on the assurance that the courts in interpreting the Constitution will engage in reasoned and principled decision making. Approval of the widespread, highly intrusive search programs at issue here on the basis of lower court speculations on how far this Court intended to move the Fourth Amendment law in its *Skinner* and *von Raab* opinions does not, we submit, constitute such decision making.

In sum, the decision as to whether the government may constitutionally require that individuals who are not suspected of any wrongdoing are to be subject to random, unannounced, and repeated drug testing should not be treated as a decision arrived at *sub silentio* in *Skinner* and *von Raab*. Rather, it is an open issue that should be decided by this Court after squarely confronting the unique aspects of these unprecedented testing programs.

I. Government Programs Of Mandatory Drug Testing On A Random, Unannounced And Repetitive Basis Work Intrusions Into Privacy That Are Substantially Greater Than Those In *Skinner* And *van Raab* And Thus Present Important And Unresolved Fourth Amendment Issues.

A. In his argument to this Court in *von Raab*, then-Solicitor General Charles Fried made explicit that the pre-employment testing program at issue in that case presented a legal question quite different from the question that is presented here:

> [T]he random kind of testing . . . is not before you. * * *
>
> If we have a case in which a much larger population is tested or where the method is random drug testing, then I would hope the Court will consider that case on the record that will then be established

> after it has been sorted over and digested by courts below. But we ask neither that we get a hint or a signal helping us out in those cases, but we hope that nothing will be said to preclude them either. That really lies in the future. [Transcript of Oral Argument, *von Raab*, *supra*, at 42-43 (November 2, 1988).]

Similarly, Attorney General Richard Thornburgh, in arguing *Skinner*, stressed that post-accident testing presented a far different legal issue than that presented here:

> I think it's significant to note that the regulations did not call for the testing of all employees or for periodic random testing procedures. They were tied instead to specific events . . . defined by objective standards. [Transcript of Oral Argument, *Skinner*, *supra*, at 13 (November 2, 1988).]

The government, in presenting *Skinner* and *von Raab*, in other words, clearly understood that programs like the one now at issue work much more substantial intrusions into privacy than the testing programs challenged in those cases. And the government further understood that this difference in intrusiveness is of constitutional significance since the precondition to a suspicionless search program is that the search involve no more than a "minimal" intrusion into privacy. *See New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985) ("exceptions to the requirement of individualized suspicion are generally appropriate *only* where the privacy interests implicated are minimal"). Indeed, this principle was explicitly reaffirmed in *Skinner* and *von Raab*:

> In limited circumstances, *where the privacy interests implicated by the search are minimal* and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of [individualized] suspicion. [*Skinner*, 57 L.W. at 4330 (emphasis

added); *see also von Raab*, 57 L.W. at 4342-4343 n.2 & 4344 n.4 (noting factors in particular search program that "reduc[e] to a minimum any unsettling shows of authority" and "significantly minimize the intrusiveness of the . . . drug screening program" at issue).]

Thus, the *Skinner* and *von Raab* decisions rest on this Court's conclusion that the programs there could properly be deemed to be no more than "minimally intrusive." And, in *Skinner*, the Court went on to caution that precisely because such tests "require employees to perform an excretory function traditionally shielded by great privacy," the intrusions of drug testing programs into personal privacy will "*not* [be] characterize[d] . . . as minimal in most contexsts." 57 L.W. at 4330 (emphasis added).[11]

B. The drug testing program at issue here is vastly more intrusive into privacy than the programs that this Court sustained in *Skinner* and *von Raab*. Since the governing legal standard is that such programs are constitutional only if the program works no more than a minimal intrusion on privacy, it follows that *Skinner* and *von Raab* cannot be viewed as having decided this case.

The DOT plan requires a regime of monitored urine testing in which, at any time, "all covered employees will

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[11] As this Court explained, the individual's feelings of concern and indignity when confronted with government demands for monitored urine test are entirely reasonable:

> "There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom." . . . [T]he collection and testing of urine [therefore] intrudes upon expectations of privacy that society has long recognized as reasonable. [*Skinner*, 57 L.W. at 4328 (quoting *National Treasury Employees Union v. von Raab*, 816 F.2d 170, 175 (5th Cir. 1987)).]

have an equal statistical chance of being selected for testing." Pet. App. 52a. Testing may occur "on any scheduled workday." *Id.* And all random testing must be entirely "unannounced." *Id.* Put simply, each employee will continue to be subject to random selection for the remainder of her worklife, regardless of how often she has been tested, how uniformly innocent her prior tests, or how unblemished her work and health records. And, any employee who fails to cooperate with the program is subject to discharge. Pet. App. 71a.[12]

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[12] Once selected, an employee must follow a rigidly prescribed and scrutinized course of conduct relating to the giving of a urine sample.

Upon selection, she must immediately report to a "collection site," which may be a public restroom or other area which DOT has designated and "secure[d]" to assure that "[n]o unauthorized personnel [are] permitted." At this site, a "collection site person" will scrutinize the employee's conduct. HHS guidelines, *supra*, 53 Fed. Reg. at 11980.

Upon arrival, the employee must: (1) "present some type of photo identification" to the "collection site person"; (2) fill out a "pre-test information form" which elicits "information regarding [any] drugs an employee uses which may affect the outcome of the test"; (3) remove her "unnecessary outer garments (e.g., coat, jacket) that might conceal items or substances that could be used to tamper with or adulterate [a] urine specimen"; (4) leave any personal belongings (other than a wallet) with the "collection site person"; (5) wash and dry her hands; and (6) stand in the presence of the "collection site person" in a location that does not provide "access to water fountains, faucets, soap dispensers, or cleaning agents or other materials which could be used to adulterate the specimen." *Id.* at 11980-11981.

The employee is then supplied with a "disposable specimen container" and is normally permitted to urinate into this container outside of the direct observation of the "collection site person"—*viz.*, in the privacy of a bathroom stall or other partitioned area—although the act must be done in sufficiently close physical proximity to the "collection site person" so that any "unusual behavior" by the employee can be noted. *Id.* at 11981.

The employee must provide the specimen to the "collection site person," who will determine if it is of sufficient volume and within the normal temperature range. If the specimen is not of sufficient

Such a program works a significantly more intrusive invasion on employee privacy than *Skinner's* post-accident program or *von Raab's* pre-employment program in at least two critical regards.

First, under post-accident and pre-employment testing, a urine collection test will be a rare (and possibly even a one-time) event in an employee's worklife. In contrast, the very essence of the DOT program is the requirement of repeated urine collections and testing of each covered employee throughout her working life. The program here establishes a regime under which invasive demands and the apprehension of such demands are—and henceforth will be—a recurrent and ever-present part of every covered employee's work day.

Second, unlike pre-employment or post-accident testing, the testing in this case is entirely a function of the fact that the employee has chosen to pursue a certain occupation; the testing is not triggered by any more proximate or individualized events or decisions that might rationally justify to an employee why she must submit to the government's repeated testing demands. Given the fact that monitored urine testing is uniquely objectionable to many individuals precisely because the test is widely perceived as dehumanizing, the absence of any individualized reason for the testing demands further increases the affront. *Compare Skinner*, *supra* (testing based on one's involvement in a serious accident that one may have caused); *von Raab*, *supra* (testing prior to beginning new safety related job after applying to job with knowledge of testing requirement).

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volume, the employee will be required to "drink fluids to facilitate urination" and, if necessary, to "remain at the test site for [up to] 2 hours" until a sufficient specimen is obtained. Any employee's "inability . . . to provide the necessary specimen" is "treated as a refusal" by the employee to cooperate with the test. If the specimen is not within the normal temperature range, the employee will be required to urinate again, this time under the direct observation of the "collection site person." Pet. App. 61a; 53 Fed. Reg. 11981.

The inherently intrusive nature of random urine testing, moreover, is substantially exacerbated by the fact that the DOT requires that each test here be unannounced. It is too plain for argument that the absence of advance notice of an anxiety-producing search is a factor of major significance in heightening its intrusiveness. *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-559 (1976) (preventing surprise reduces intrusion); *Wyman v. James*, 400 U.S. 309, 320 (1971) (same).

Here, the affected employee is yanked from her normal routine without an opportunity to prepare emotionally, and the program's design thereby dramatically increases the inherent tendency of drug testing to cause indignity, fright, and concern. *See von Raab, supra*, 57 L.W. at 4342, n.2. (intrusiveness of pre-employment drug test was "significantly minimize[d]," because job applicants are "notified [five days] in advance of the scheduled sample collection"). Given the lack of any rational public need for eliminating advanced warning, this aspect of the program must be viewed as an especially egregious government invasion of reasonable privacy expectations.

C. Taken together, these factors make clear that the purpose and effect of the DOT drug testing program is to create in each and every individual who works in a covered occupation a realistic, continuing, and ever-present apprehension that at any moment, and without reason or warning, she may be subjected to a highly invasive urine collection demand.

While we believe that the intrusiveness of such a program simply cannot be deemed "minimal"—and that the program is therefore unconstitutional—for present purposes it is enough that these factors certainly render the program legally distinct from those at issue in *Skinner* and *von Raab*. Since millions are now being subject to such constitutionally controversial programs, this case raises a substantial question that should be resolved by this Court.

II. The Courts Of Appeals—Including The Court Below—Have Erroneously Assumed That *Skinner* And *von Raab* Decided The Validity Of Random, Unannounced And Repetitive Drug Testing And They Are Thus Not Independently Examining The Issue.

A. The panel below had no occasion to state its reasoning at length since the Court of Appeals for the District of Columbia Circuit had already determined its position on random testing. *See Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied sub nom. Bell v. Thornburgh*, —— U.S. —— (January 22, 1990).[13] But an examination of *Harmon* reveals that in that case, too, the court of appeals engaged in no serious analysis; rather, *Harmon* sustained a random testing program simply on the strength of *Skinner* and *von Raab*.

The *Harmon* panel began its discussion of random testing by complaining that neither *Skinner* nor *von Raab* state a clear rule for distinguishing "legitimate drug-testing programs . . . from illegitimate ones," 878 F.2d at 488, and by suggesting that "[t]he invasion of privacy occasioned by [random and repetitive programs] might . . . be regarded as different in kind from the intrusion at issue" in those cases, *id.* Indeed, the *Harmon* panel expressly recognized that "a coherent theory might be constructed which would make [random and repetitive selection] a fundamental distinction." *Id.* at 489. But *Harmon* then rejects this possibility with the conclusory statement that "the Supreme Court has not encouraged the construction of such a theory." *Id.* The principal

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[13] Virtually the entire discussion of the issue in the court of appeals' decision below was as follows:

> While it is true that the regulations sustained in *Skinner* required testing only after a triggering event . . . we do not find that . . . [this] fact[] compels "a fundamentally different analysis from that pursued by the Supreme Court." *Harmon*, 878 F.2d at 489. While it is true that random testing may increase employee anxiety and the invasion of subjective expectations of privacy, it also limits discretion in the selection process and presumably enhances drug-use deterrence. [Pet. App. 12a-13a.]

basis given for this conclusion is that in *von Raab* much of the discussion of the need for minimizing the intrusiveness of testing "was confined to a footnote." *Id.* (citing *von Raab*, 57 L.W. at 4342 n.2).

Given this treatment, it is clear that the court below has never given independent, reasoned consideration to the substantial constitutional issues in this case, but has instead assumed that those issues were decided *sub silentio* in *Skinner* and *von Raab*.

The Court of Appeals for the District of Columbia Circuit is not alone in its failure to confront the question presented here. Its method of approach—that *Skinner* and *von Raab* should be read as broadly validating random testing programs—is the one that the lower courts are routinely following.

For example, the Fourth Circuit, in *Thompson v. Marsh*, 884 F.2d 113, 114 (4th Cir. 1989), recently issued a brief *per curiam* opinion stating simply—and erroneously—that in *Skinner* and *von Raab* "the Supreme Court decided that random drug tests do not violate the Fourth Amendment." And the Seventh Circuit recently disposed of a similar case simply by noting *Harmon* and the instant case with apparent approval. *See, Taylor v. O'Grady*, 888 F.2d 1189, 1198, 1200-1201 (7th Cir. 1989).[14]

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[14] The Seventh Circuit's *Taylor* decision does not actually reach the specific issue of the validity of random drug testing programs such as the instant one; rather the testing program in *Taylor* was one in which each employee was required to submit annually to a surprise testing demand. *See Taylor, supra*, 888 F.2d at 1198.

The law in the First Circuit, although not entirely clear, may also take *Skinner* and *von Raab* as having decided the constitutionality of random testing. In *Guiney v. Roache*, 873 F.2d 1557 (1st Cir. 1989), *cert. denied*, —— U.S. —— (November 13, 1989) that court remanded a random testing case back to the district court for disposition in light of *Skinner* and *von Raab*. Although the opinion's wording does not make clear the First Circuit's view of whether the random testing issue was decided, both parties seem to have construed the opinion as holding that further

For the reasons already given, *supra* pp. 9-14, the judgment as to whether the Constitution permits widespread, suspicionless, unannounced searches of the kind at issue here is one that should be rendered after this Court has squarely confronted that question and not on the basis of a lower court's intuition on how far the *Skinner* and *von Raab* opinions are to be extended. Fidelity to the Fourth Amendment demands no less—and as we will show in the full briefing of this case—in fact demands far more.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of *certiorari* to review the decision of the Court of Appeals for the District of Columbia Circuit in this case.

Respectfully submitted,

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challenge on the issue was foreclosed by this Court's decisions. *See* Petition for Certiorari, *Guiney v. Roache*, No. 89-205; Respondent's Brief in Opposition, *Guiney v. Roache*, *supra*.

The Third and Eighth Circuit had explicitly upheld random testing programs prior to this Court's *Skinner* and *von Raab* decisions. *See Transport Workers Union, Local 234 v. SEPTA*, 884 F.2d 709 (3d Cir. 1989) (upholding random testing program based on pre-*Skinner* and pre-*von Raab* law of the circuit); *Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988) (upholding random testing program based on rationale different from that adopted in *Skinner* and *von Raab*).

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 87-5417

AMERICAN FEDERATION OF GOVERMENT EMPLOYEES, AFL-CIO, *et al.*,

Appellants,

v.

SAMUEL K. SKINNER,
Secretary Department of Transportation, *et al.*

Argued Oct. 18, 1988

Decided Sept. 8, 1989

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 87-01815)

Joe Goldberg, with whom Mark D. Roth and Charles A. Hobbie, Washington, D.C., were on the brief, for appellants.

John R. Bolton, Asst. Atty. Gen., Dept. of Justice, with whom Jay B. Stephens, U.S. Atty., Leonard Schaitman and Robert V. Zener, Attys., Dept. of Justice, Washington, D.C., were on the brief, for appellees.

William W. Osborne, Jr. and John R. Mooney, Washington, D.C., were on the brief, for amicus curiae urging reversal.

Before WALD, Chief Judge; MIKVA and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

SENTELLE, Circuit Judge:

On June 29, 1987, the Secretary of Transportation announced a plan for testing certain employees of the Department of Transportation ("Department") for unlawful drug use. Order 3910.1, "Drug-Free Departmental Workplace," U.S. Dep't of Transportation, June 29, 1987 ("Order 3910.1"), Joint Appendix ("J.A.") at 17. Depending on the safety and security "criticalness" of the duties or prospective duties, employees and applicants may be subjected to urinalysis in one or more of seven circumstances.[1] Those employed in "Category I" positions —jobs determined by the Department to have a direct impact on public health, safety, or national security— may be required to submit to random testing.

Appellants, the American Federation of Government Employees and certain Category I employees, brought suit to enjoin the suspicionless testing, alleging, *inter alia*,

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[1] Order 3910.1 provides for the following types of testing:

(1) random; (2) periodic; (3) reasonable suspicion; (4) pre-employment/pre-appointment; (5) accident or unsafe practice; (6) voluntary; and (7) follow-up. Order 3910.1, Ch. III § 3(A), J.A. at 28-29. All covered employees are subject to reasonable suspicion, accident or unsafe practice, and voluntary testing. Only those who participate in a drug rehabilitation and/or abatement program are subject to follow-up testing. *Id.* § 4(G), J.A. at 30. Periodic testing may be required for certain employees who are already required to be periodically medically examined. *Id.* § 3(A), J.A. at 29.

violations of the Fourth and Fifth Amendments, the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-795i (1982 & Supp. V 1988), and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, *et seq.* (1982). The District Court's Fourth Amendment analysis focused on our opinion in *NFFE v. Weinberger*, 818 F.2d 935 (D.C.Cir. 1987), which the trial court interpreted to require the balancing of factors bearing on reasonableness. *AFGE v. Dole*, 670 F.Supp. 445, 447 (D.D.C.1987). After weighing a variety of factors,[2] the Court determined that, on balance, "[t]he random urine drug testing plan is reasonable on its face and must be sustained at this stage." *Id.* The Court disposed of appellants' statutory challenges in short order, concluding in a footnote that they were "not significant." *Id.* at 447 n. 6. Accordingly, the Court granted the Department's motion for summary judgment.

In this appeal appellants renew their contentions of Fourth Amendment and statutory violations. We affirm.

I.

According to Executive Order 12,564, signed by President Ronald Reagan on September 15, 1986, on- or off-duty illegal drug use by federal employees "evidences less

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[2] On the governmental side of the Fourth Amendment balance, the Court weighed "whether the search was justified at its inception, whether there are reasonable grounds to suspect work related drug use will be uncovered, whether those subjected to the test . . . are only those who in fact occupy critical positions . . . and whether use of illegal drugs is likely to impair a critical employment work efficiency." 670 F.Supp. at 448. On the other side of the balance, the District Court weighed the employees' privacy interests, while identifying factors tending to diminish that interest. The Court emphasized the Department's advance notice of program implementation, the employees' "familiarity with testing safeguards and procedures," the preexistence of a periodic urinalysis testing program, and the "discreet and private" testing procedures. *Id.* at 447-48.

than the complete reliability, stability, and good judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure." Exec. Order No. 12,564, 3 C.F.R. 224 (1987), *reprinted in* 5 U.S.C. § 7301 note at 175-77 (Supp. IV 1986). The Order accordingly directed executive-branch agencies to establish mandatory programs to test employees in "sensitive positions" for the use of illegal drugs. The Department became the first executive agency to implement a drug-testing program pursuant to the President's Order. Departmental Order 3910.1 establishes two categories of employees subject to testing, so designated because of their "safety and security criticalness." Order 3910.1, Ch. III, § 2, J.A. at 28. Employees whose positions bear "a direct and immediate impact on public health and safety, the protection of life and property, law enforcement, or national security," *i.e.*, Category I employees, are made subject to five types of testing: (1) random; (2) periodic "if they are required to take periodic physical examinations"; (3) reasonable suspicion; (4) accident or unsafe practice; and (5) follow-up. Order 3901.1, Ch. III, § 3 (A), J.A. at 28-29. All applicants for Category I positions must submit to pre-appointment testing. *Id.*, J.A. at 29. All other employees in sensitive positions, classified as "Category II" employees, are subject to reasonable suspicion, accident or unsafe practice, and follow-up testing. *Id.* § 3(B), J.A. at 29. As of June, 1987, the Department had classified nearly 30,000 of its approximately 62,000 employees in Category I. J.A. at 769.

Nearly two-thirds of the employees subject to random and periodic urinalysis testing are air traffic controllers, *id.*, a group of employees not party to these proceedings, *see* Brief for Appellants at 23 n. 17.[3] Nearly twenty-two

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[3] The National Air Traffic Controllers Association, exclusive bargaining representative of the approximately 12,000 controllers em-

percent are employed as "electronic technicians." J.A. at 769. The remaining twelve percent are, among others, aviation safety inspectors (3%), motor carrier and highway safety specialists (1%), railroad safety inspectors (1.1%), civil aviation security specialists (.9%), aircraft mechanics (.7%), and motor vehicle operators (.2%). *Id.* at 769-70.[4]

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ployed by the Federal Aviation Administration, a subordinate agency of the Department, appeared as an amicus curiae in these proceedings.

[4] The complete list of covered employees is as follows:

Office of the Secretary: motor vehicle operators.

United States Coast Guard: firefighters, nurses, criminal investigators, vessel traffic controllers, maritime traffic controllers (pilot), electronics mechanics, aircraft electricians, instrument merchanics, metals inspectors, shipwright foremen, transportation equipment operation family, aircraft oxygen equipment mechanics, aircraft engine mechanics, aircraft mechanics, master pilots (ferryboat), chief engineers (ferryboat), oiler (ferryboat and diesel).

Federal Aviation Administration: electronics technicians, civil aviation security specialists, aviation safety inspectors, air traffic control specalists, inspection/flight test pilots, transportation equipment operation family, aircraft mechanics.

Federal Highway Administration: highway safety specialists, motor carrier safety specialists, transportation equipment operation family.

Federal Railroad Administration: industrial hygienists (headquarters), general engineer (field and headquarters), civil engineers (field and headquarters), railroad safety series (field and headquarters), motor vehicle operators, safety engineer (headquarters), mechanical engineers (headquarters), electrical engineers (headquarters), chemical engineer (headquarters), transportation specialists (headquarters).

Saint Lawrence Seaway Development Corporation: lock and dam operators, vessel traffic controllers, transportation equipment operation family.

[Continued]

The testing procedures employed by the Department are substantially identical to those used by the Army to test its civilians, which we outlined in *NFFE v. Cheney*, 884 F.2d 603 (D.C.Cir.1989). Order 3910.1 explicitly provides that the guidelines for drug testing published by the Department of Health and Human Services are to govern. Order 3910.1, Ch. III, § 1, J.A. at 28. *See* "Mandatory Guidelines for Federal Workplace Drug Testing, Programs," 53 Fed.Reg. 11,970 (Apr. 11, 1988) ("HHS Regulations" or "HHS Reg."). Order 3910.1 supplements the HHS Regulations with additional safeguards to be followed in both the sample-collection process and in the chain of specimen-custody. Order 3910.1 Ch. III, §§ 8-10, J.A. at 32-39. Like the Army, the Department considers a test result positive for proscribed drugs only if it is positive on each of two separate tests, an initial test using immunoassay methods and a confirmatory test using gas chromatography/mass spectrometry (GC/MS) techniques. *See* HHS Reg. § 2(4(e)-(f). "All specimens negative on [the] initial test or negative on the confirmatory test *shall be reported as negative.*" Order 3910.1, Ch. III, § 9(B), J.A. at 38 (emphasis in original). The Department, like the Army, tests urine for the presence of five drugs (or their metabolites); marijuana, cocaine, PCP, opiates, and amphetamines. *Id.* 11(A)(1)-(5), J.A. at 39-40.

Unlike the Army program, the Department's plan permits an employee who has tested positive to insist that the sample be tested again, either at the site of the original tests or, at his own expense, "at another quali-

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[4] [Continued]

Office of Inspector General: criminal investigators.

Maritime Administration: transportation equipment operation family, engineers (watchstander), maritime general maintenance mechanics (deck/engine).

See Order 3910.1 Appendix A. The record does not reveal the allocation of employees in the various covered positions.

fied laboratory identified by the employee." *Id.* § 9(E), J.A. at 39. Although a Category I employee who tests positive "will be assigned non-safety or non-security duties," *id.* Ch. IV, § 6, J.A. at 42, he may not be discharged solely because of a single positive test result, *id.* Ch. VI, § 1(B), J.A. at 45. Absent additional circumstances, an employee will be removed from federal service only if he tests positive a second time.[5]

II.

As in *Harmon v. Thornburgh*, 878 F.2d 484 (D.C.Cir. 1989), and *Cheney, supra*, our analysis in the instant case is guided by the Supreme Court's recent opinions in *National Treasury Employees Union v. Von Raab*, —— U.S. ——, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), and *Skinner v. Railway Labor Executives' Association*, —— U.S. ——, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). In *Von Raab*, the Court sustained urinalysis testing of United States Customs Service employees slated for promotions into positions that involved either interdicting illicit drugs or carrying a firearm. 109 S.Ct. at 1397. The Court withheld judgment on the reasonableness of testing employees solely because they would handle classified material, instead remanding the case to the Court of Appeals so that it could "clarify the scope of this category of employees." *Id.* In *Skinner*, the Court upheld the Federal Railroad Administration ("FRA") regulations authorizing railroads to toxicologically test certain employees involved in train accidents or incidents of violations of safety rules. 109 S.Ct. at 1420-21. In both cases the

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[5] The Department retains the right to remove immediately certain drug-using employees, including employees found to be using illegal drugs on duty or determined to have engaged in certain drug-related offenses. Immediate discharge is also required for certain testing-related violations: refusal to enter or successfully complete a rehabilitation/abatement program, refusal to provide a specimen, and adulteration or substitution of a specimen. *See* Order 3910.-1, Ch. VI, § 1(A)-(F), J.A. at 45.

Court concluded that suspicionless testing, while a search, was reasonable and thus conformed with the dictates of the Fourth Amendment.

In their supplemental brief, filed at our direction after the Supreme Court issued its opinions, appellants argue that *Skinner* and *Von Raab* "should have little or no impact upon the decision in the instant case." Supplemental Brief for Appellants at 2. On a general level, appellants contend that "the results of *NTEU* and *RLEA* have no bearing on the employees in the instant case," who are neither engaged in drug interdiction nor employed as "operational members of train crews." *Id.* at 1. Appellants also argue that random testing, the exclusive focus of our attention,[6] is "vastly more intrusive than the limited drug testing" approved by the Supreme Court. *Id.*

We first must determine whether the Department's plan "serves special governmental needs, beyond the normal need of law enforcement." *Von Raab*, 109 S.Ct. at 1390. If it does, *Skinner* and *Von Raab* make clear that the plan need not necessarily be supported by probable cause or any level of particularized suspicion in order to be constitutional. *Id.*; *Skinner*, 109 S.Ct. at 1414, 1417.

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[6] While it is not clear which aspects of the District Court's order appellants intended to bring forward on appeal, *compare* Brief for Appellants at 8 n. 9 ("Appellants seek appeal of the district courts [sic] dismissal only as to random, periodic, and accident or unsafe practice drug testing.") *with* Supplemental Brief for Appellants at 1 n. 2 ("The appellees [sic] have challenged only random, and accident or unsafe practice testing."), in their most recent submission appellants appear to indicate that their challenge is directed exclusively at random testing, *id.* *But see id.* at 7 (Random testing is "the principle [sic] issue of the case presently before the Court."). We consider only the random aspect of the Department's plan, both because it was the only aspect appellants challenged in their complaint, *see* Complaint for Declaratory and Injunctive Relief at 2, J.A. at 2, and because it was the only aspect passed upon by the District Court, *see* 670 F. Supp. at 449.

Appellants point out that the Department tests only for the presence of *illegal* drugs—rather than for any performance-impairing agent—thus making "clear that the agency's concern is law enforcement rather than direct public safety." Brief for Appellants at 27. Moreover, the failure to test for legal drugs such as valium "makes a mockery out of the agency's pious protestations of concern with public safety." *Id.* at 28. Amicus similarly argues that the "true objectives" of the Department's program have been displaced by "a more saleable" rationale based on the Department's "rather idiosyncratic" aviation safety rationale. Brief for Amicus Curiae at 4, 3.

These contentions give us little pause. Initially, even if we were to assume, as amicus contends, *id.* at 5 n. 4, that the animating motive behind Executive Order 12,564 was the mandatory testing of all federal employees,[7] the Department's program tests only those whose duties bear "a direct and immediate impact on public health and safety, the protection of life and property, law enforcement or national security." Order 3910.1, Ch. III, § 3 (A), J.A. at 28. Law enforcement appears nowhere among the program's stated goals, and more to the point, nonconsensual disclosure of test results to police authorities is proscribed both by regulation and statute. *See* HHS Reg. § 2.8; Pub.L. No. 100-71, § 503(e), 101 Stat. 471 (1987).

There can be little doubt, then, that the testing plan serves needs other than law enforcement, and therefore need not necessarily be supported by any level of particularized suspicion. In order to determine the appropriate standard of reasonableness, we are "to balance the individual[s'] privacy expectations against the Government's interest to determine whether it is impractical to

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[7] This contention is belied by the fact that the Order recommends testing only for those who occupy jobs "sensitive" from the standpoint of security, health, and safety.

require a warrant or some level of individualized suspicion in the particular context." *Von Raab*, 109 S.Ct. at 1390. *Accord Skinner*, 109 S.Ct. at 1414; *see also O'Connor v. Ortega*, 480 U.S. 709, 719, 107 S.Ct. 1492, 1499, 94 L.Ed.2d 714 (1987). This approach necessarily recognizes that not every invasion of privacy is proscribed by the Fourth Amendment. If a careful balancing of interests suggests that the public interest would be best served by requiring a standard of reasonableness short of particularized suspicion, we should not hesitate to adopt that standard. *Cf. New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 742, 83 L.Ed.2d 720 (1984) (adopting reasonableness balancing instead of probable cause). The balance we strike in the present case is substantially identical to that struck by the Supreme Court in *Skinner* and by us in *Cheney*.

III.

The Department identified as Category I personnel those employed in some twenty different positions relating to air, rail, highway, and water transportation.[5] More than 94% of the employees subject to random testing under the plan work for the Federal Aviation Administration ("FAA"). J.A. at 769. As we noted earlier, nearly two-thirds of the covered employees occupy a

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[5] The Department deemed the following positions as those having the necessary impact on public health, safety, or national security to warrant their inclusion in Category I: motor vehicle operators; criminal investigators; vessel traffic controllers; air traffic controllers; mechanics (general maintenance, electronic, instrument, aircraft oxygen equipment, aircraft engine); aircraft electricians; inspectors (metals, aviation, railroad safety series); transportation equipment operation family; pilots (master inspection/flight test); civil aviation security specialists; safety specialists (highway, motor carrier, railroad, safety engineer); engineers (general, civil, mechanical, electrical, chemical); firefighters; nurses; shipwright foremen; chief engineers (ferryboat); oiler (ferryboat and diesel); electronics technicians; industrial hygienists; transportation specialists; lock and dam operators.

single position, air traffic controller, and are not parties to this litigation. *See supra* note 3 and accompanying text. Of the remainder, most are, to varying degrees, employed in positions relating to transportation safety, among them mechanics, inspectors, and engineers.

As the District Court noted, written justifications were not produced for each covered position. *See* 670 F.Supp. at 449. Nor for that matter have appellants at any stage in this litigation challenged the inclusion of the vast majority of the categories of employees. Rather, they have singled out three categories, arguing that their inclusion evidences the unreasonableness of the entire testing regime.

Before addressing the three specifically challenged positions, we note that the record amply evidences the extraordinary safety sensitivity of the bulk of the covered positions. For example, FRA safety inspectors and safety specialists are charged with the duties of reviewing railroad operating practices, inspecting track and signal conditions, and enforcing compliance with safety laws and regulations. J.A. at 465. The Federal Highway Administration's highway and motor carrier safety specialists are charged with similar duties, including handling of hazardous materials, investigating trucking companies' safety system, and exploring unsafe practices complaints. J.A. at 771.

The duties of lock and dam operators at the Saint Lawrence Seaway Development Corporation, an operating administration within the Department, are responsible for guiding commercial vessels and pleasure craft through the lock area, which includes the lock chamber, adjacent control towers, and approach walls. Lock operators are responsible for negotiating craft through the lock chamber. J.A. at 471-72. Vessel traffic controllers are similarly responsible for navigating traffic along 140 miles of the St. Lawrence River, its twenty ports and Lake Ontario. J.A. at 472.

It would appear that the Supreme Court's rationale for upholding testing of certain railroad personnel in *Skinner* is the natural starting point to determine whether the Department's asserted safety interests justify the testing of employees so intimately involved with safe transportation. In *Skinner*, the Supreme Court reviewed FRA-adopted regulations authorizing private railroads to toxicologically test certain of their employees. Under the FRA regulations, private railroads are empowered to subject to urine and blood or breath tests all railway crew members and other covered employees "directly involved" in certain incidents and specified safety breaches. Like the Department's program, the FRA regulations provide for two types of urine testing, a screening test and a confirmatory test utilizing gas chromatography/mass spectrometry methods, before a sample is deemed positive for the presence of drugs.

The Court identified several governmental interests advanced by testing railroad crew members who perform "duties fraught with . . . risks of injury." *Skinner*, 109 S.Ct. at 1419. First, testing would promote the compelling interest of detecting regular drug users, who, the Court determined, could "cause great human loss before any signs of impairment become noticeable to supervisors or others." *Id.* Second, "the FRA regulations supply an effective means of deterring employees engaged in safety-sensitive tasks from using controlled substances or alcohol in the first place." *Id.* Thus, because testing was precipitated by "a triggering event, the timing of which no employee can predict with certainty," testing would likely serve as an effective deterrent against on-duty impairment. *Id.* at 1420. Finally, post-incident testing results would "help railroads obtain invaluable information about the causes of major accidents . . . and to take appropriate measures to safeguard the general public." *Id.* at 1420 (citations omitted).

We find this analysis fully applicable in the present case. While it is true that the regulations sustained in

Skinner required testing only after a triggering event and in a medical environment, we do not find that either of these facts compels "a fundamentally different analysis from that pursued by the Supreme Court." *Harmon*, 878 F.2d at 489. While it is true that random testing may increase employee anxiety and the invasion of subjective expectations of privacy, it also limits discretion in the selection process[9] and presumably enhances drug-use deterrence. Neither can we conclude that testing in a medical environment is a *sine qua non* of constitutionally permissible urine testing, for as even appellants admit, the regulations approved in *Von Raab* provided for samples to be collected by non-medical personnel in a public restroom. *See* Supplemental Brief for Appellants at 4.

We also find applicable the reasoning in our decision in *Jones v. McKenzie*, 833 F.2d 335, 340-41 (D.C.Cir. 1987), *vacated sub nom. Jenkins v. Jones*, —— U.S. ——, 109 S.Ct. 1633, 104 L.Ed.2d 149 (1989), *replaced*, 878 F.2d 1476 (D.C.Cir.1989). Appellee, a school bus attendant in the District of Columbia Public School System's transportation branch, challenged the School System's employee drug-testing program. We found the criteria for testing reasonable, though we questioned the validity of testing procedures on grounds no longer viable in light of the later Supreme Court opinions. After the Supreme Court vacated our judgment in light of *Skinner* and *Von Raab*, we recently reinstated our original judgment after appropriately modifying the accompanying opinion. In so doing, we noted that "the School System clearly had a legitimate justification" for testing "employees involved in the transportation of handicapped children." *Jones*, 878 F.2d 1476, Judgment Order at 2. Given our conclusion in *Jones* that the governmental interest in the health and safety of handicapped children

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[9] Order 3910.1 requires that each Category I employee "have an equal statistical chance for being selected for testing within a specified time frame." Order 3910.1, Ch. III, § 4(A), J.A. at 29.

reasonably warranted testing employees who daily transport them, we are hard pressed to develop any theory that would prevent the testing of covered employees in the present case. If anything, the safety justifications presented here are, in the main, more compelling.

As we noted earlier, appellants have singled out for attack the inclusion of three categories of employees: motor vehicle operators, FRA hazardous material inspectors, and FAA aircraft mechanics. *See* Brief for Appellants at 28-29; *cf.* Supplemental Brief for Appellants at 1 n.1. The District Court concluded that the inclusion of these employees was "fully justified within the program." *Dole*, 670 F.Supp. at 448. We agree. The record reveals that the assigned duties of a hazardous material inspector require exposure "to poisonous, explosive, and highly flammable commodities that could be . . . suddenly ignited by improper handling." J.A. at 771. Furthermore, an FRA inspector may be required to inspect hazardous material shipments and is required to verify proper packaging, rail operating restrictions, and handling and loading requirements. J.A. at 466. Appellants have offered nothing to rebut these claims. Ensuring that these employees—whose exclusive assigned duties are so intimately related to the prevention of public harm —are certifiably drug-free is, in our view, a reasonable precaution against the occurrence of the feared harm. While the danger posed by a drug-impaired inspector may be of somewhat lesser proportions than that posed by one who has "routine access to dangerous nuclear power facilities," *Skinner*, 109 S.Ct. at 1419, it closely parallels the risk posed by drug-impaired Army guards stationed near explosive munitions. *See Cheney*, 884 F.2d at 612. Ultimately, "the public should not bear the risk that employees who may suffer from impaired perception and judgment" occupy positions where they are so responsible for protecting the public. *See Von Raab*, 109 S.Ct. at 1393.

Appellants also challenge the inclusion of an FAA aircraft mechanic who inspects and maintains FAA aircraft. We need look no further than our recent opinion in *Cheney* for guidance on this classification. In sustaining the Army's testing of air traffic controllers, pilots, and aviation mechanics, we noted that "[a] single drug-related lapse by any covered employee could have irreversible and calamitous consequences." *Cheney*, at 610. The record in the present case amply supports the same conclusion. Covered mechanics perform pre-flight inspections and overhauls, and install and maintain electronic instrumentation and other flight control equipment. J.A. at 772. Given that a drug-related lapse could portend irreparable injury to life and property, mandatory, random urinalysis does not appear to be an unreasonable means of detecting and preventing that risk. *See also Von Raab*, 109 S.Ct. at 1395 & n. 3; *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir.1974) (reasonableness of search depends on balancing need for search against offensiveness of intrusion); *Cheney*, 884 F.2d at 610.[10]

The third challenged position, encompassing one-fifth of one percent of the total number of Category I employees, is motor vehicle operator. *See* J.A. at 262. As their sole argument of unconstitutionality, appellants point to a union member driver whose exclusive duties entail driving a mail van, and ask: "Is this a vital position requiring compromise of the 4th Amendment for an overriding public safety concern?" Brief for Appellants at 28.

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[10] While appellants have not argued that testing is unnecessary because of the availability of less intrusive alternatives, the sole mechanic-affiant on which they rely asserted that each mechanic's work is reviewed by a "Quality Assurance Inspector" or "another certified mechanic." Even if the assertion rises to the level of a properly submitted argument, it would fail for essentially the same reasons we rejected the claim in *Cheney* that drug testing was unnecessary in light of proscriptions already in force. *See Cheney*, at 610-11; *see also Skinner*, 109 S.Ct. at 1419 n. 9.

As noted by the District Court, strong safety interests support the testing of most Department motor vehicle operators, who are responsible for, *inter alia*, the transportation of visiting foreign dignitaries and key Department officials and the operation of passenger-laden shuttle buses. *See* 670 F.Supp. at 448 n. 10; J.A. at 851-52. Shuttle buses transport as many as 1,200 passengers each day. J.A. at 852. Thus, obvious safety interests support the testing of the majority of the Department's motor vehicle operators. Appellants' objection to the inclusion of motor vehicle operators may in part be rooted in their mistaken understanding of the Department's rationale for testing, which counsel for appellants incorrectly summarized as follows: The "motor vehicle can run into a school bus carrying 312 diplomats, cause an international incident and can then cause a war." Transcript of Proceedings at 9 (Oct. 20, 1988).

The inclusion of a mail van operator does not demonstrate the unreasonableness of the plan. Initially, all drivers are subject to extensive background investigations and have either a top secret or secret security clearance. J.A. at 852. *Von Raab* teaches that the government may properly make urine testing a requirement for those who are "likely to gain access to sensitive information." 109 S.Ct. at 1397. Thus, the Court concluded that employees seeking promotions to positions that would require handling classified information may be required to submit to the Custom Service's tests. Although the Court did not delimit the boundaries of "sensitive information," nor define what categories of information would be sufficiently sensitive to warrant mandatory drug testing,[11] it bears noting that there is no indication in the Court's opinion that testing should be limited to those with the highest security classification.

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[11] There are three levels of security classification: confidential, secret, and top secret. *See* 47 Fed. Reg. 14,874 (Apr. 6, 1982).

In *Harmon*, we recognized that whatever the boundaries of "truly sensitive" information, top secret materials "lie at its *very core*." *Harmon*, 878 F.2d at 492 (emphasis added). Accordingly we sustained the Department of Justice's program mandating drug testing for personnel with top secret clearances. *Id.* at 491-492. At the same time, however, we rejected Justice's claim that its interest in protecting confidential but unclassified information reasonably warranted the random testing of all prosecutors and all personnel with access to grand jury information. As we said there: "[W]e believe that the term [truly sensitive information] cannot include *all* information which is confidential or closed to public view. . . . The fact that the employees covered by the Department's drug testing regulations deal with confidential information . . . does not distinguish them from . . . government employees generally." *Id.* at 492 (emphasis in original).

In the present case, we believe that faithful application of the Supreme Court's teachings in *Von Raab* and our own precedent command that we find that the government's interest in protecting truly sensitive information from one who " 'under compulsion of circumstances or for other reasons, . . . might compromise [such] information,' " *Von Raab*, 109 S.Ct. at 1396 (quoting *Department of the Navy v. Egan*, 484 U.S. 518, ——, 108 S.Ct. 818, 824, 98 L.Ed.2d 918 (1988)), outweighs the privacy interests of tested mail van operators. Their assigned duties require both the acquisition of a secret or top secret security clearance and regular access to classified information. Moreover, all motor vehicle operators are subject to background investigations, J.A. at 852, which, the Supreme Court has clearly stated, "may be expected to diminish [the employees'] expectations of privacy in respect to a urinalysis test." *Von Raab*, 109 S.Ct. at 1397 (citation omitted). Each of the above-noted features severely reduces motor vehicle operators' expecta-

tions of privacy, and, therefore, mandatory, random urinalysis constitutes only a modest additional privacy intrusion.

We also find significant the fact that employees in each of the three covered positions work in settings other than the "more traditional office environments," *Von Raab*, 109 S.Ct. at 1395, where "drug use is, presumably, more easily detected by means other than urine testing," *Harmon*, 878 F.2d at 488. In short, "[t]he operational realities of the workplace," *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 1498, 9 4L.Ed.2d 714 (1987) (plurality opinion), are such that "a diminished expectation of privacy attaches to information relating to the physical condition of covered employees." *Skinner*, 109 S.Ct. at 1419.

IV.

Apart from their claims of constitutional error, appellants maintain that the District Court erred in granting summary judgment, as there remained outstanding issues of material fact. On appeal from an order granting summary judgment, we review the record *de novo* to determine whether it supports that order. *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1485 (D.C. Cir.1989); *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 598 (D.C.Cir.1988). In the "run-of-the-mill civil case," when the defendant moves for summary judgment, we enquire whether a "fairminded jury could return a verdict for the plaintiff on the evidence presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). If the record, viewed in the light most favorable to the nonmoving party, reveals no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law, summary judgment shall be granted in its favor. *Id.* at 250, 106 S.Ct. at 2511. *See* FED.R.CIV.P. 56(c).

The Supreme Court has indicated that the allocation of the substantive burden of proof informs our decision on

the propriety of the grant of summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). *Celotex* instructs that summary judgment is properly entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, *and on which that party will bear the burden of proof at trial.*" *Id.* at 322, 106 S.Ct. at 2552 (emphasis added) (nonmoving party bore ultimate burden of proof at trial). *See also Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1032 (D.C.Cir.1988) (applying *Celotex*-enunciated rule where nonmoving party bore initial burden of production, but not burden of proof).

There is surprisingly little authority discussing the allocation of the burden of proof in drug-testing cases. Although neither *Von Raab* nor *Skinner* directly addressed this question, *Von Raab* may hint that the burden rests with the government to prove reasonableness: "[W]e believe that the Government has demonstrated that its compelling interests in safeguarding our borders and the public safety outweigh the privacy expectations" of personnel who interdict illegal drugs and carry firearms. 109 S.Ct. at 1396. Such a conclusion would be consistent with the array of criminal cases placing the burden of demonstrating the lawfulness of a Fourth Amendment encounter on the government. *See, e.g., Unted States v. Mendenhall*, 446 U.S. 544, 557, 100 S.Ct. 1870, 1878, 64 L.Ed.2d 497 (1980) (government has burden of proving consent to accompany government agents); *United States v. Carreon*, 872 F.2d 1436, 1441 (10th Cir.1989) ("When a search . . . is challenged as violative of the Fourth Amendment, the burden is on the government to prove its validity.") (citations omitted); *United States v. Vega-Barvo*, 729 F.2d 1341, 1349 (11th Cir.1984) (burden on government to prove reasonable suspicion to justify strip search).

On the other hand, in a civil action brought pursuant to 42 U.S.C. § 1983, it appears that the plaintiff shoulders the burden of proving each element essential to his case, including the illegality of the government conduct in question. *See, e.g., Everett v. Napper*, 833 F.2d 1507, 1512-13 & n. 7 (11th Cir.1987) (placing on plaintiff burden of demonstrating unreasonableness of drug-testing scheme); *Kunzelman v. Thompson*, 799 F.2d 1172, 1176 (7th Cir.1986) (discussing relative burdens in relation to collateral estoppel); *Guenther v. Holmgreen*, 738 F.2d 879, 888 (7th Cir.1984) (same).[12] By the same token, in the context of the civil forfeiture provisions of the Controlled Substances Act, 21 U.S.C. § 881(d), *where the government is the plaintiff*, it bears the burden of establishing the lawfulness of the Fourth Amendment encounter. *See, e.g., Boas v. Smith*, 786 F.2d 605, 609 (4th Cir.1986) (burden on government to show probable cause to believe that the property is linked to illegal activity); *United States v. United States Currency $31,828*, 760 F.2d 228, 230 (8th Cir.1985) (same).

We need not resolve the question of the allocation of the burden of proving the reasonableness *vel non* of the testing regime, for even if we assume that the burden rests with the government, we conclude that the government established that there is no genuine issue as to any material fact that it must prove at trial and that it is entitled to judgment as a matter of law.

Among the issues identified by appellants as material, and therefore preclusive of summary judgment, was the accuracy of the urinalysis testing procedures used by the Department. *See* Statement of Genuine Issues of Material Fact 3, at 1-2, J.A. at 65-66. Inspection of the

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[12] These cases appear fully consistent with the line of cases under section 1983 which place upon the defendant the burden of establishing the *defense* of qualified immunity. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987); *Martin v. Malhoyt*, 830 F.2d 237, 263 (D.C. Cir. 1987).

referenced portions of the record reveals that the parties did in fact disagree over the accuracy of the testing procedures: while the Department contended that the GC/MS technique could be 100% accurate, appellants maintained that testing could produce an error rate of one percent. *See* J.A. at 143; *see also* Reply to Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction at 11. While in some contexts such a disagreement might be sufficient to create a triable question of fact, such is not the case here. First, because this is a facial attack on the Department's program, we decide only "whether the tests contemplated by the regulations can *ever* be conducted." *Skinner*, 109 S.Ct. at 1421 n. 10 (citing *Bell v. Wolfish*, 441 U.S. 520, 560, 99 S.Ct. 1861, 1885, 60 L.Ed.2d 447 (1979)) (emphasis in original). Furthermore, the facts demonstrate "that the tests at issue here are accurate in the overwhelming majority of cases." *Id.* As such, *Skinner* suggests that, even when viewed in the light most favorable to appellants, the facts do not create an issue for trial, and summary judgment was not on this basis improperly granted.

Appellants also identified as a genuine issue of material fact the extent of drug use among Department employees. *See* Statement of Genuine Issues of Material Fact B, at 3, J.A. at 67. The referenced portion of the record reveals that the declarant knew of no drug use among the fifteen motor vehicle operators with whom he worked. *See* J.A. at 262. Even if we were to assume that the declaration sufficiently demonstrates a genuine disagreement as to the extent of Department-wide drug use, the claim would not create a triable issue of fact. *Von Raab* indicates that a history of intra-agency drug use is not an essential ingredient in establishing the reasonableness of a testing regime. There it was contended that the Customs Service's program was unreasonable because all but a few of the tested employees were entirely innocent of wrongdoing. The Court re-

jected this claim and concluded instead that "[i]t is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context." 109 S.Ct. at 1395 n. 3.[13]

Appellants have, at least arguably, gone further than respondents in *Von Raab*, arguing that "[t]he government's own documents . . . clearly state that the FAA (by far the largest drug testing [Department] component), has a minimal drug 'problem.'" Brief for Appellants at 26. *Cf. Von Raab*, 109 S.Ct. at 1395 (concluding there was little reason to suspect that the Customs Service was "immune" from society's pervasive drug abuse problem). Appellants point to a document issued by the FAA's Director of Aviation, Marine, and Research Programs, which, among other things, states that "[t]here is no reported evidence that use of drugs has resulted in any safety-related incidents in the FAA," and that "relatively few drug-related incidents of any nature have been recorded." *See* J.A. at 802-03. Viewed in context, the memorandum actually tends to establish the reasonableness of the Department's decision to implement testing.

The FAA document was precipitated by a report issued in 1984 by the Department's Office of Inspector General ("OIG") undertaken "to determine the adequacy of the [FAA's Drug and Alcohol Awareness] program in identifying, referring for treatment, and monitoring FAA personnel with drug, alcohol, and other related problems which may affect their job performance." J.A. at 782. Among the conclusions drawn was that the "FAA has a significant number of employees with drug, alco-

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[13] In light of this conclusion, it is not surprising that in their supplemental briefing appellants abandoned their earlier contention that "[t]he mere assertion of a societal drug problem is not reason enough to abandon" requirement of particularized suspicion. Brief for Appellants at 34.

hol, and other personal problems who have not been identified or tested." *Id.* The OIG also concluded that "FAA does not know the seriousness of the problem or number of employees because it does not have an effective drug and alcohol policy and a strongly endorsed employee assistance program." *Id.* Accordingly, the OIG recommended that the FAA develop and implement a drug screening and testing program. *Id.* at 788.

The FAA's response was mixed. Rather than flatly disputing the OIG's conclusions, the FAA responded that the OIG report was "unbalanced" because it omitted "positive" information and was based on "unsupported data." J.A. at 802. Furthermore, the FAA did not deny that some of its employees might be impaired by drug use; it said only that "[f]or the size of the FAA work force" illicit drug use was "relatively" minimal. *Id.* at 803. Thus, the FAA concluded that the OIG report "would more accurately describe the situation if it was changed from 'The FAA has . . .' to 'The FAA may have. . . .'" *Id.* at 802. In light of the sharp increase in the number of Departmental employees entering drug counseling programs in the years succeeding the OIG Report (from 16 in 1984 to 133 in 1986), many of whom were FAA employees (45 air traffic controllers in one year), J.A. at 765-66, we cannot accept appellants' contention that the Department was acting upon no evidence. From this vantage, far from demonstrating the unreasonableness of the Department's action, the Department's response to the OIG's report is more logically viewed as a hallmark of responsible management.

Appellants also argue that they were wrongly denied a trial because a genuine issue of fact remained as to the correlation between a positive urinalysis test result and current drug impairment. *See* Statement of Genuine Issues of Material Fact C, at 3, J.A. at 67. The materiality of such a fact is established, appellants argue, by

the Fourth Amendment's requirement that testing be able to detect only job-impairing drug use.

Although the District Court concluded that the Department "presented proof that drug use, at the level sought by testing generally impairs the normal functioning of employees," *Dole*, 670 F.Supp. at 448, the Department admits that "[t]he district court did overstate the principal thrust" of its evidence. Brief for Appellee at 20. Appellants' first contention—that the judgment of the District Court must be reversed because it accepted a proposition which is scientifically incorrect—overlooks the principle that our review of a grant of summary judgment is *de novo*. Their alternative claim—that the issue of the relationship between off-duty drug usage and on-duty impairment is genuinely disputed and material, and therefore precluded the granting of a motion for summary judgment—while more significant, must also fall.

It should initially be noted that the Department stipulated that urinalysis tests do not necessarily measure actual physical or mental impairment. *See* Defendant's Response to Plaintiffs' Statement of Genuine Issues of Material Fact at 7, J.A. at 74. Thus, we cannot conclude that any factual disagreement precluded summary judgment. Nor can we conclude that summary judgment was improperly granted as a matter of law. As we explained in *Cheney*, the Supreme Court's opinions in *Skinner* and *Von Raab* convince us that the failure of a testing technique to measure actual impairment does not necessarily impugn its legitimacy. *Cheney*, 844 F.2d at 609-610.

In *Skinner*, the Ninth Circuit concluded, as appellants contend herein, that drug testing was constitutionally infirm because of its inability to differentiate drug use that results in on-duty impairment from that which does not. *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575, 588 (9th Cir.1988), *rev'd sub nom. Skinner v. Railway Labor Executives' Association*, —— U.S.

——, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). The Supreme Court rejected this view, in part because it overlooked the principle that relevant evidence need only make a fact of consequence more or less probable, and in part because the regulations "are designed not only to discern impairment but also to deter it." *Skinner*, 109 S.Ct. at 1421.

Von Raab, where the Court sustained as reasonable the Customs Service's practice of urine testing those whose post-promotion duties would require carrying a firearm, also strongly suggests that the inability of the testing procedures to differentiate on- and off-duty drug impairment is not determinative of the regime's constitutionality. *See Cheney*, 884 F.2d at 609-10. As was true in *Von Raab*, the agency's responsibility to "ensur[e] against the creation of th[e] dangerous risk" posed by drug-using covered employees, 109 S.Ct. at 1393, warrants reasonable measures to detect drug use. Thus, we must reject, as we rejected in *Cheney*, the contention that urinalysis testing is unconstitutional because of its failure to differentiate on- and off-duty drug impairment. 884 F.2d at 609-610. Accordingly, the District Court did not for this reason err in granting the Department's summary judgment motion.

Appellants also contend that a trial was necessary to determine whether drug use manifests itself in signs of impairment. *See* Statement of Genuine Issues of Material Fact 9, at 2, J.A. at 66. Appellants claim that the detectability of impairment is material to the reasonableness of drug testing because it "directly affects the governmental interest portion of the Fourth Amendment." Brief for Appellants at 48. We agree that in certain circumstances the detectability of impairment by means other than urine testing may be a relevant consideration in determining the reasonableness of a drug-testing plan. Thus, the *Von Raab* Court credited the fact that it was "not feasible" to subject interdiction

agents or other field employees "to the kind of day-to-day scrutiny that is the norm in *Von Raab*, 109 S.Ct. at 1395. In *Harmon*, we concluded that the Court viewed employment in a traditional office environment as relevant because in such circumstances "drug use is, presumably, more easily detected by means other than urine testing." *Harmon*, 878 F.2d at 489.

In the context of the present case, appellants have not even argued that it would be practical or feasible to subject covered employees to the sort of day-to-day scrutiny such that testing is unnecessary. We are unable to discern any other materiality in the ascertainment of whether drug users display indicia of impairment. In any event, we could not find that the reasonableness of the Department's plan "'necessarily or invariably turn[s]'" on the existence of less intrusive alternatives to testing. *See Skinner*, 109 S.Ct. at 1419 n. 9 (quoting *Illinois v. Lafayette*, 462 U.S. 640, 647, 103 S.Ct. 2605, 2610, 77 L.Ed.2d 65 (1983)). In the present case, no less than in *Skinner*, the "insistence on less drastic alternatives would require us to second-guess the reasonable conclusions drawn by the" Department. *Id.* Moreover, employees who are subject to testing in this category "can cause great human loss before any signs of impairment become noticeable to supervisors or others." *See id.* at 1419; *see also supra* note 10 and accompanying text.

In short, appellants have offered no basis on which we can find that summary judgment was improperly granted.

V.

As to appellants' statutory claims, we agree with the District Court that they "are not significant." *Dole*, 670 F.Supp. at 447 n. 6. First, appellants contend that the Department's drug-testing program discriminates against "handicapped" persons in violation of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-795i (1982 & Supp. V 1988). The Act protects an "otherwise qualified handi-

capped individual" from discrimination "solely by reason of his handicap." *Id.* § 794. It should surprise no one, including appellants, that we will not in the context of a facial challenge to the Department's drug-testing program conclude that the District Court erred in not adopting a rationale dependent on the theory that every potential employee testing positive for drug use is an "otherwise qualified handicapped" person. Should a day arise when a handicapped individual within the protection of the Rehabilitation Act is disadvantaged by this program and presents a claim in a concrete factual setting, that will be soon enough to consider the effects of that statute on the provisions of the testing program. *See Doe v. New York Univ.*, 666 F.2d 761, 776-77 (2d Cir. 1981) (concluding that plaintiff must bear the ultimate burden of showing "that in spite of the handicap he is qualified and . . . that he is at least as well qualified as other applicants."); *Strathie v. Department of Transp.*, 716 F.2d 227, 230 (3d Cir.1983) (reviewing plaintiff's burden of proof). *See generally, School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 285 n. 14, 107 S.Ct. 1123, 1130 n. 14, 94 L.Ed.2d 307 (1987) (citing with approval *Strathie* and *Doe*).

Appellants' other statutory claim, based on the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* (1982), is hardly more substantial. Appellants argue that the Department acted arbitrarily and capriciously by instituting a drug-testing program that tested for the five above-lised categories of drugs, but not for alcohol, "the drug which is most abused." Brief for Appellants at 45. It has never been the law that the government is forbidden from addressing a problem unless it addresses all other problems of similar magnitude. *See, e.g., Williamson v. Lee Optical*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). In short, we conclude that the District Court did not err in its summary disposition of the nonconstitutional claims.

VI.

In their facial challenge to the Department's implementation of mandatory, random urine testing, appellants have challenged the program *in toto*. They have specifically called into question the inclusion of only three categories of employees. Although we explicitly requested in our order for supplemental briefing that appellants consider the extent to which the testing of the various job classifications being considered warranted differing treatment than that in *Skinner* and *Von Raab*, appellants did not alter their previous course. We have found the privacy interests of employees occupying the three specifically challenged positions outweighed by the Department's compelling interests in preventing drug use among such personnel. Moreover, we have concluded that the program is supported by sufficiently compelling circumstances to justify the invasions of privacy entailed by conducting such searches without any measure of individualized suspicion. For these reasons, and the others stated above, we hold that the mandatory, suspicionless testing of Category I personnel is reasonable and consistent with the Fourth Amendment, the APA, and the Rehabilitation Act of 1973. Accordingly, the judgment of the District Court is

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 87-1815

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,
Plaintiffs,

v.

ELIZABETH H. DOLE, Secretary,
Department of Transportation,
Defendant.

Sept. 30, 1987

Mark D. Roth, Joe Goldberg, Washington, D.C. for plaintiffs.

William W. Osborne, Jr., John R. Mooney, Washington, D.C., for amicus curiae, Nat. Air Traffic Controllers.

Robert Cynkar, Richard Greenberg, Dept. of Justice, Richard K. Willard, Wayne Vance, Robert Chesnut, Dept. of Transp., Washington, D.C., for defendant.

MEMORANDUM

GESELL, District Judge.

This is a suit to enjoin the Department of Transportation ("DOT") from continuing to carry out its random drug testing plan [1] developed under authority of Execu-

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[1] "Drug-Free Departmental Workplace," U.S. Dep't of Transportation, June 29, 1987.

tive Order 12,564 captioned "Drug-Free Federal Workplace." Exec.Order No. 12,564, 3 C.F.R. 224 (1987). Plaintiff ("AFGE") is a labor union representing certain employees subject to the DOT plan which was announced June 29, 1987, and went into effect September 8, 1987.

DOT has moved for summary judgment and in opposing, AFGE has moved for a preliminary injunction, which in turn is opposed by DOT. Extensive papers have been filed and all issues were fully argued.[2]

The DOT plan under attack here supplements other DOT drug programs for testing certain employees at time of employment and at intervals scheduled well in advance by providing for random urinalysis testing of certain employees in sensitive positions.[3] Only employees

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[2] The chronology of this litigation is as follows: AFGE filed the complaint on July 7, 1987 and DOT promptly filed an answer on July 15, 1987. On July 30, DOT moved for summary judgment and AFGE obtained an extension to respond by August 21, with DOT subsequently replying on August 31.

On August 6, AFGE was advised that if a motion for preliminary injunction were to be filed it could in the Court's absence be heard by the motions judge before Labor Day. AFGE did not file its motion for preliminary injunction until August 21, when responding to defendant's motion for summary judgment. DOT promptly responded in opposition on August 31, and AFGE replied on September 11. Oral argument was heard on Monday, September 14, 1987.

[3] Employees in these positions are chosen for random testing through haphazard neutral computer selection. At varying times "from month to month" a list of employees to be tested is randomly selected. Declaration of Melissa J. Allen, Deputy Assistant Secretary for Administration of the Dept. of Transportation, Defendant's Exhibit J at para. 12. All employees subject to random testing have an equal statistical chance to be chosen for each testing list without regard to previous selections. *Id.* This type of testing is unannounced and could occur on any scheduled workday, apparently once a month, although the number to be involved is not clear from the record. *See* "Drug-Free Departmental Workplace," U.S. Dep't of Transportation, ch. III, § 4, p. III-2, June 29, 1987.

having critical jobs and falling in Category I are subject to this random testing. These employees are in jobs concerned with public health, safety, national security, and law enforcement; jobs which involve duties calling for the highest degree of trust and confidence. Each critical position subject to random testing is supported by a written justification statement describing why the job is critical and what would happen if an incumbent used illegal drugs. These justifications are subject to review and are monitored by an Assistant Secretary. Jobs from GS-4 to GS-14 and equivalents are covered, thus including both union and non-union supervisory employees.

Ninety-four percent of the employees covered hold aviation-related positions such as air traffic controllers, electronic technicians, aviation safety inspectors and airchaft mechanics. In addition, fire fighters, nurses, railroad safety inspectors, armed law enforcement officers and "top secret" security clearance personnel are among those subject to random testing. Testing is under considerate procedures reflecting regard for personal privacy.[4] No criminal use will be made of the results and no discipline other than an offer of rehabilitation service will occur if a first-time random urinalysis test is positive.[5] All disciplinary actions that may occur upon fur-

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[4] The Department testing plan is in strict accordance with the mandatory policies and procedures outlined in the "Scientific and Technical Guidelines for Drug Testing Programs" issued by the Alcohol, Drug Abuse and Mental Health Administration, Department of Health and Human Services, on February 13, 1987 (changed language July 20, 1987). —— Fed. Reg. —— (1987).

[5] Before any official action is taken, positive test results are first reported to the Medical Review Officer ("MRO"). The MRO, in turn, contacts the employee and gives him or her the opportunity to explain the test results as well as reviewing medical records submitted by the employee or any other relevant biomedical factors necessary to determine whether there is a legitimate medical explanation for the positive result. If the MRO determines that a

ther testing are subject to the Civil Service Reform Act of 1978. 5 U.S.C. § 1201 *et seq.* (1982 & Supp. III 1985).

To support its sweeping facial challenge to DOT's random drug testing plan, AFGE relies primarily on the Fourth Amendment to the Constitution,[6] asserting that under the facts and circumstances shown by the affidavits and materials filed, random testing constitutes an unreasonable search.[7] Elaborating, the Union points, among other things, to the admitted lack of probable cause, the lack of indisputable evidence that drug use always impairs employee performance, the lack of results

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legitimate medical explanation exists, the test results may be reported as negative. Thus, for example, an employee who uses a spouse's prescription medication without medical consultation for a similar ailment and tests positive would be given the opportunity to provide a legitimate medical explanation for the test results.

[6] The nonconstitutional claims are not significant. Even if a drug user is considered handicapped, freedom from drug effects is a proper standard governing critical jobs. *See Heron v. McGuire*, 803 F.2d 67 (2nd Cir. 1986) (per curiam). This has long been accepted in these critical jobs with few exceptions and, accepting the agency's expert's view that drug use will injure job performance, there is nothing arbitrary or unreasonable in pursuing a drug-free workplace for such employees through random testing. Moreover, the tests are scientifically pointed to current drug usage (*i.e.*, use within several days or hours prior to testing) and do not offend The Drug Abuse Office and Treatment Act. 42 U.S.C. § 290ee-1(c)(1) (Supp. III 1985). Under the test laid down by this Circuit, probable cause is not required where a governmental employee's drug usage might endanger public health or safety and criminal sanctions following a positive test are not contemplated. *See Nat'l Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 942-43 & n. 12 (D.C. Cir. 1987).

[7] There were no formal rule-making proceedings since the plan involves an internal personnel policy and AFGE has undertaken no formal discovery. *See* 5 U.S.C. § 553(a)(2) (1982) (notice of proposed rulemaking shall be published "except to the extent that is involved— . . . (2) a matter relating to agency management or personnel . . ."); *Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982).

procured in other non-random testing and the excessive intrusion upon privacy which arbitrarily results.

The Court clearly has jurisdiction to consider this constitutional challenge. There is no question that mandatory random urine testing is a search within the meaning of the Fourth Amendment under the controlling law of this Circuit, as the guiding precedent, *Nat'l Fed'n of Fed'l Employees v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir.1987), makes clear. However, the Amendment only prohibits "unreasonable" searches, and accordingly the focus of the drug testing case, like other Fourth Amendment testing cases, is factual, requiring the Court to balance factors bearing on reasonableness.[8]

National Federation of Federal Employees v. Weinberger. 818 F.2d 935 (D.C. Cir.1987), deals with a urinalysis drug testing program involving civilian employees of the Department of Defense. The Court emphasized that the balancing function concerns the "employees' reasonable expectations of privacy" considered against the " 'government's interest in the efficient and proper operations of the work place.' " *Id.* at 942 (citations omitted).

As to the employees' privacy expectations, relevant factors include the nature and quality of the intrusion or search and whether employees have had reasonable advance notice and, of course, familiarity with testing safeguards and procedures of the plan after its effective date. In this situation 60 days' advance notice was given. Moreover, most employees subject to the random testing have had their urine tested for drug use at various times during their employment at scheduled intervals. The random testing is obviously somewhat more intrusive than the scheduled testing since it occurs in the midst of

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[8] *See, e.g., Nat'l Employees Treasury Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987); *Local 1812, American Fed'n of Gov't Employees v. Dep't of State*, 662 F. Supp. 50 (D.D.C. 1987).

a day's work, and necessarily focuses special attention on a particular employee whose name crops up through chance computer selection.[9] Testing itself is discreet and private.

On the other side of the balance the Court must consider issues raised in the litigation which go to the government's justification for its random testing plan. These involve: considering whether the search was justified at its inception, whether there are reasonable grounds to suspect work related drug use will be uncovered, whether those subjected to the test, generally speaking, are only those who in fact occupy critical positions affecting safety and security and whether use of illegal drugs is likely to impair a critical employee's work efficiency.

AFGE contends:

(1) that the true purpose of the testing is law enforcement, not safety and security;

(2) that based on past experience the testing will not prove productive;

(3) that many subjected to random testing are not, in fact, in critical jobs; and

(4) that recent drug use, medically speaking, cannot necessarily be shown to affect employment efficiency.

These positions are not supported in the factual record before the Court insofar as they may have legal relevance to the challenged testing personnel policy announced. They are considered seriatim below:

(i) No ulterior motive was established. DOT simply realized that illegal drug use has not been eliminated by

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[9] This possible "shock" aspect can be minimized if the random, nonspecific nature of the testing is explained clearly at the time it occurs, emphasizing the lack of specific cause both to the employee selected and others in the workplace who become aware of the testing.

criminal law enforcement and felt an obligation to protect public safety and to gain confidence for its programs. Tests are not used for criminal law enforcement purposes.

(ii) The fact that testing after substantial advance notice has not resulted in many positive urine samples bears little or no relationship to what may occur from random testing. The prospect of a random test may well itself be prophylactic and scheduled testing gives no measure of the random programs effectiveness.

(iii) AFGE presented no proof in support of its claim that noncritical jobs are involved. The three examples used by plaintiff in its brief proved fully justified within the program.[10]

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[10] AFGE cites, in cursory fashion, three examples in its brief of positions within Category I it claims are not safety or security sensitive—mail van opertaor, Federal Railroad Administration Hazardous Material Inspector and FAA aircraft mechanic. Affidavits from Operating Element heads who must file job category justification statements effectively refute these contentions. Hazardous materials inspectors are "exposed to poisonous, explosive, and highly flammable commodities that could be leaking from rail cars or containers, or suddenly ignited by improper handling." Declaration of Melissa J. Allen, Deputy Assistant Secretary for Administration of the Department of Transportation, Defendant's Exhibit J at para. 11(d). Aircraft mechanics in the Department's Coast Guard and FAA perform a variety of tasks involving the installation, inspection and maintenance of aviation equipment and "failure to perform properly any of these duties could result in an aircraft crash." *Id.* at para. 11(e). Finally, as to the motor vehicle operators in the Department, all operators are subject to background investigations and have either a "Top Secret" or "Secret" security clearance. Declaration of Gary McCullough, Deputy Chief, Personal Property Division, Office of Administrative Services and Property Management, Defendant's Exhibit N at para. 4. These drivers perform tasks including: transportation of visiting foreign dignitaries and key DOT officials, carrying classified documents and driving shuttle buses—all either safety or security related duties. *Id.*

(iv) DOT presented proof that drug use, at the level sought by testing generally impairs the normal functioning of employees.

Thus, on balance, the preponderance of the proof supports the reasonableness of the random plan. DOT's duty to assure the integrity of its sensitive aviation and other critical jobs and to protect the public safety is undisputed. The plan reflects a high degree of concern for employee privacy interests and is carefully tailored to assure a minimum of intrusion. The plan must be sustained against this generalized facial attack.

There is no proof of any results from a single random test under the plan or indeed that one has occurred. The written justification for each job in the critical category was not produced by either side. Thus the broad facial challenge to the entire plan has come to the Court in an incomplete and untested context. Given the sparse record and perhaps premature nature of the attack, the Court's conclusion leaves open the way for a later, more specific challenge clearly directed to a job category or to the beneficial or ineffective nature of the random program after its effectiveness can be measured by ample experience.

In view of the limited form in which this matter has been presented and to guarantee more informed review should a more specific, discrete claim be later advanced to some aspect of the plan as it develops, the Secretary shall maintain full records of each random test and subsequent personnel actions taken and it will be highly advisable to develop more precise procedures for informing any individual selected for a random test while safeguarding the employee against any possibility of misunderstanding in his immediate work place as to the circumstances under which the particular employee has been singled out.

AFGE has failed to support its challenge to the random drug testing plan or to demonstrate that the individ-

ual plaintiffs should be exempted by reason of the nature of their duties. The random urine drug testing plan is reasonable on its face and must be sustained at this stage. Summary judgment is granted for the Secretary and AFGE's motion for preliminary junction is denied. The complaint is dismissed. An appropriate Order is filed herewith.

ORDER

Upon consideration of plaintiffs' motion for preliminary injunction and defendant's motion for summary judgment, the responses thereto and the entire record, and for the reasons set forth in the Court's Memorandum filed this day, it is hereby

ORDERED that defendant's motion for summary judgment is granted; and it is further

ORDERED that to facilitate any subsequent factual challenge to any aspect of the random testing, the Court directs that the Department of Transportation maintain full records of each random test and any subsequent personnel actions taken as a result of such testing pending further Order of the Court; and it is further

ORDERED that plaintiff's motion for preliminary injunction is denied.

APPENDIX C

U.S. DEPARTMENT OF TRANSPORTATION

Office of the Secretary
of Transportation

DRUG-FREE DEPARTMENTAL WORKPLACE

U.S. DEPARTMENT OF TRANSPORTATION

[ORDER 3910.1]

June 29, 1987

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CHAPTER I

GENERAL PROVISIONS

SECTION 1. *PURPOSE.*

This directive transmits the Department of Transportation (DOT) policy and procedures for implementing Executive Order 12564, "Drug-Free Federal Workplace."

SECTION 2. *POLICY.*

It is the policy of DOT to assure the establishment and maintenance of a drug-free workplace as intended by the Executive Order and as directed by the President in his memorandum of October 4, 1986, to the Heads of Executive Departments and Agencies. In carrying out this requirement, emphasis will be placed on the transportation mission of our agency and the necessity for a drug-free transportation system.

Communication to all employees of the goals and objectives of a drug-free workplace is the essence of a successful program, especially communication of the hazards of drug use, and the availability of aid and assistance for employees to enable them to understand and deal with potential drug problems. Equally important is the assurance to employees that

their dignity and privacy will be respected as fully as possible in reaching the Department's goal of a drug-free workplace.

SECTION 3. *COVERAGE.*

This directive will apply to all Operating Administrations within the Department, the Office of the Secretary (OST), and the Office of Inspector General (OIG). The term "Operating Elements" will be used throughout this directive to refer to the aforementioned organizations.

SECTION 4. *REFERENCES.*

A. Authorities

(1) Executive Order 12564, "Drug-Free Federal Workplace," September 15, 1986.

(2) Scientific and Technical Guidance for Drug Testing Programs issued by the Alcohol, Drug Abuse and Mental Health Administration, U.S. Department of Health and Human Services (HHS), dated February 13, 1987, and establishing mandatory criteria for Federal civilian drug testing programs pursuant to Executive Order 12564.

(3) Drug Abuse Prevention, Treatment and Rehabilitation Act of 1972, as amended (42 U.S.C. Section 290ee-1 *et seq.*), establishing requirements for prevention, treatment, and rehabilitation programs and services for drug abuse among Federal civilian employees.

(4) Federal Employee Substance Abuse Education and Treatment Act of 1986, Public Law (P.L.) 99-570, Title VI, requiring agency programs to provide prevention, treatment,

rehabilitation and education services to Federal civilian employees with respect to drug and alcohol abuse.

(5) Civil Service Reform Act of 1978, P.L. 95-454.

(6) 5 CFR Part 792, establishing regulatory requirements for alcoholism and drug abuse programs and services for Federal civilian employees.

(7) 42 CFR Part 2, establishing requirements for assuring the confidentiality of alcohol and drug-abuse patient records.

(8) The Privacy Act of 1974 (5 U.S.C. Section 552a), prescribing requirements governing the maintenance of records by agencies pertaining to the individuals and access to these records by the individual(s) to whom they pertain.

(9) 49 CFR Part 10, implementing the Privacy Act of 1974, within DOT.

B. Guidance

(1) Federal Personnel Manual (FPM) Letters 792-16 and 792-17, setting forth guidelines for Federal civilian agencies in establishing a drug-free Federal workplace pursuant to Executive Order 12564.

(2) FPM Chapter 792, Federal Health and Counseling Programs, providing guidance to Federal agencies in establishing alcoholism and drug abuse programs (subchapter 5) and employee counseling services programs (subchapter 6) for Federal employees with alcohol or drug problems.

(3) FPM Supplement, Chapter 792-2, providing guidance for developing and maintaining appropriate prevention, treatment and rehabilitation programs and services for alcoholism and drug abuse among Federal employees.

(4) Departmental Personnel Manual (DPM), Chapter 792, implementing FPM Chapter 792 and FPM Supplement, Chapter 792-2, within DOT.

SECTION 5. *BACKGROUND.*

On September 15, 1986, President Reagan signed Executive Order 12564, "Drug-Free Federal Workplace." In addition, on October 4, 1986, the President issued a memorandum to the Heads of Executive Departments and Agencies on the subject: "Federal Initiatives for a Drug-Free America."

As the Executive Order sets forth, illegal drug use is having serious adverse effects on the national work force. As a major Federal employer, DOT is concerned with the well-being of its employees, the successful accomplishment of agency missions, including assuring complete safety in the transportation system, and the need to maintain employee productivity. Most importantly, it is clear that nowhere does the private choice to use drugs have more devastating public consequences than in the transportation sector. The maintenance of a safe and effective transportation system demands, in particular, that those DOT employees whose jobs involve significant responsibilities affecting public safety and security remain drug-free.

In order to assure the establishment and maintenance of a drug-free Federal workplace, the Executive Order mandates that: (1) Federal employees

are required to refrain from the use of illegal drugs, (2) the use of illegal drugs by Federal employees, whether on or off-duty, is contrary to the efficiency of the service, and (3) persons who use illegal drugs are not suitable for Federal employment.

The Head of each Executive Agency is responsible for developing a plan for achieving the objective of a drug-free workplace, with due consideration of the rights of the Government, the employee, and the general public.

SECTION 6. *RESPONSIBILITIES.*

A. The Assistant Secretary for Administration is responsible for the following:

(1) Ensuring the consistent implementation of this directive throughout the Department.

(2) Establishing any further procedures which may be necessary to carry out this directive.

(3) Designating the Department's Medical Review Officers (MRO).

B. Heads of Operating Administrations, the Assistant Secretary for Administration, and the Inspector General are responsible for ensuring the implementation of this directive within their organizations, appointing Drug Program Coordinators and Employee Assistance Program (EAP) Coordinators, and providing for the protection of the confidentiality of test results.

SECTION 7. *MEDICAL REVIEW OFFICER (MRO).*

A. In accordance with HHS criteria, the MRO will be a licensed physician with knowledge of substance abuse disorders. This officer is responsible

for the receipt, review, and interpretation of all confirmed positive test results submitted to DOT from the drug testing laboratory. His or her review will be performed prior to the transmission of any positive test results to Drug Program Coordinators or any management officials.

B. A positive test result does not automatically identify an employee/applicant as an illegal drug user. The MRO should undertake the examination of alternative medical explanations for a positive test result. This action could include the conduct of employee medical interviews, review of employee medical history, or the review of any other relevant biomedical factors. The MRO is required to review all medical records made available by the tested employee when a confirmed positive test could have resulted from legally prescribed medication.

C. If the MRO determines there is a legitimate medical explanation for the positive test result, the MRO may deem that the result is consistent with legal drug use and take no further action other than reporting the test result as negative. In addition, the MRO, based on review of inspection reports, quality control data, multiple samples, and other pertinent results may deem the result scientifically insufficient for further action and declare the individual's test result as negative.

SECTION 8. *DRUG PROGRAM COORDINATORS.*

A. Each Operating Element shall have Drug Program Coordinators assigned to carry out the purposes of this directive. These coordinators shall be responsible for implementing, directing, administering, and managing the drug program within their respective organizations.

B. Drug Program Coordinators shall serve as the principal contact with the drug testing laboratory in assuring the effective operation of the testing portion of the drug program. In carrying out this responsibility, the coordinators will perform all of the following:

(1) Assure that supervisors and employees are notified of the scheduling of periodic testing.

(2) Assure that supervisors and employees are notified of tests to be conducted on a random basis.

(3) Assure that applicants for Category I positions are tested prior to employment or appointment.

(4) Arrange for reasonable suspicion testing when directed.

(5) Arrange for accident or unsafe practice testing resulting from an on duty incident where required and in accordance with Chapter VIII of this directive.

(6) Arrange for follow-up testing when required.

(7) Arrange for voluntary testing when appropriate.

(8) Consistent with confidentiality procedures set forth in Chapter V, receive notification from the MRO of confirmed positive results.

(9) Consistent with confidentiality procedures set forth in Chapter V, notify appropriate management officials and employees of confirmed positive test results.

(8) Maintain appropriate statistical records, including numbers of employees and applicants tested and test results. Personal identifying

information in these statistical records is strictly prohibited.

C. In implementing the education and awareness portion of the drug program, the coordinators will be responsible for ensuring that:

(1) Training and education sessions regarding drug use and rehabilitation are scheduled and attended.

(2) Films, pamphlets, and promotional materials are publicized and disseminated.

(3) Technical aid and assistance is available for Operating Elements to implement all parts of the drug awareness program.

(4) An evaluation plan to specifically measure the impact of the program within the particular Operating Element is implemented.

SECTION 9. *DRUG USE DETERMINATION*

A. The determination that an employee uses illegal drugs may be made on the basis of direct observation of drug use, a criminal conviction, confirmed positive test results of the agency's drug testing program, the employee's own admission, or other appropriate administrative inquiry.

B. Positive drug test results may be rebutted by other evidence that an employee has not used illegal drugs.

CHAPTER II

DRUG AWARENESS

SECTION 1. *DRUG AWARENESS.*

A major tool in the battle against illegal drug use is ensuring that employees are aware of all the ramifications of such activity. The Department will institute a program to inform all employee of:

A. The Department's policy prohibiting illegal drug use by Departmental employees;

B. The adverse health, family and community implications inherent in illegal drug usage;

C. The impact of illegal drug usage in the workplace, including the relationship between drug use and performance, safety, productivity, and public confidence;

D. The Department's intention to assist, not punish employees, through the availability of the EAP and rehabilitation abatement resources;

E. The circumstances where disciplinary action will be required for involvement with illegal drugs;

F. The reliability of drug testing;

G. Applicable requirements to assure confidentiality of patient-records for the protection of the employee's physician-patient relationship and employee's medical histories; and

H. The Privacy Act protections afforded test results to assure that DOT will not improperly disseminate information derived from drug tests.

CHAPTER III

DRUG TESTING

SECTION 1. *POLICY.*

All collection and drug testing conducted by the Department shall be done in strict accordance with the mandatory policies and procedures contained in the HHS "Scientific and Technical Guidelines for Drug Testing Programs."

SECTION 2. *GENERAL PROVISIONS.*

The Executive Order mandates that the extent to which employees are tested and the criteria for testing are to be determined by the head of each agency. This determination shall be based upon the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee to adequately discharge the duties of his or her position. The Department program provides for seven types of testing: (1) random; (2) periodic; (3) reasonable suspicion; (4) pre-employment/pre-appointment; (5) accident or unsafe practice; (6) voluntary; and (7) follow-up. The type of testing requirements an employee will be subject to is dependent on the safety and security criticalness of the employee's position.

SECTION 3. *CATEGORIES OF EMPLOYEES.*

Two categories of safety and security criticalness, as specified below, have been established for the purpose of determining which positions will be subject to specific types of testing. Appendix A sets forth which positions within the Department are in each category.

A. Category I—Safety/Security Critical. These are positions characterized by critical safety or security responsibilities as related to the mission of the Department. The job functions associated with these positions have a direct and immediate impact on public health and safety, the protection of life and property, law enforcement, or national security. These positions require the highest degree of trust and confidence. Category I employees are subject to rigorous testing requirements. Appendix A also sets forth procedures for establishing written justification for inclusion of a position in Category I, specifically the adverse consequences that would likely occur if an incumbent in that position were to use illegal drugs.

All employees in Category I are subject to: (1) random testing; (2) periodic testing if they are required to take periodic physical examinations; (3) reasonable suspicion testing; (4) accident or unsafe practice testing; and (5) follow-up testing.

All applicants for Category I positions are subject to pre-employment pre-appointment testing.

B. Category II—All Positions Not Included in Category I. All employees in this category are subject to: (1) reasonable suspicion testing; (2) accident or unsafe practice testing; and (3) follow-up testing.

SECTION 4. *TYPES OF TESTING.*

A. Random Testing. Under this type of testing, all covered employees will have an equal statistical chance of being selected for testing within a specified time frame. This type of testing is unannounced and could occur on any scheduled workday.

B. Periodic Testing. This test will be conducted in conjunction with periodic physical examinations for employees subject to that requirement. Testing will be scheduled and announced in advance. Employees typically will be tested in their birth month or some other anniversary date.

C. Reasonable Suspicion Testing.

(1) This type of testing is authorized when management believes that an employee is using illegal drugs. This belief must be based on specific objective facts and reasonable inferences drawn from these facts in the light of experience. Reasonable suspicion does not require certainty; however, mere "hunches" are not sufficient to meet this standard. Reasonable suspicion testing will be ordered only by a management official.

(2) For purposes of this type of testing, reasonable suspicion that an employee uses illegal drugs may be based upon, among other things:

(a) observable phenomena, such as direct observation of drug use and/or the physical symptoms of being under the influence of a drug;

(b) a pattern of abnormal conduct or erratic behavior;

(c) arrest or conviction for a drug-related offense; or the identification of an employee as the focus of a criminal investigation into illegal drug possession, use or trafficking;

(d) information provided either by reliable and credible sources or independently corroborated; or

(e) newly discovered evidence that the employee has tampered with a previous drug test.

(3) Each incidence of reasonable suspicion testing must be concurred with by appropriate legal counsel in the Operating Element prior to testing in accordance with Chapter VIII.

(4) Documentation shall be developed describing the circumstances which formed the basis that reasonable suspicion exists to authorize such testing. This documentation will be retained in the adverse action file maintained in the Operating Element, or any other system of records, or will be destroyed, if appropriate.

D. Pre-employment Pre-appointment Testing. All applicants for Category I positions are subject to pre-employment pre-appointment testing for illegal drug use. All applicants with confirmed positive test results shall be refused employment.

E. Accident or Unsafe Practice Testing. Testing of employees because of an accident, injury or unsafe practice where there is reason to believe that the employee contributed to the cause of the accident or incident in accordance with Chapter VIII.

F. Voluntary Testing. Testing provided at an employee's request.

G. Follow-up Testing. All employees returned to safety or security duties are subject to unannounced follow-up testing for a one year period after return to safety or security duties or completion of the rehabilitation/abatement program, whichever is later.

SECTION 5. *NOTIFICATION TO EMPLOYEES SUBJECT TO CERTAIN TYPES OF TESTING.*

Employees subject to reasonable suspicion testing, accident or unsafe practice testing or follow-up testing shall receive notice prior to testing that includes all of the following information:

A. The reasons for the urinalysis test.

B. Assurance that the quality of testing procedures is tightly controlled, that the test used to confirm use of illegal drugs is highly reliable, and that test results will be handled with maximum respect for individual privacy, consistent with safety and security.

C. Notice of the opportunity and procedures for submitting supplemental medical documentation that may support a legitimate use for a specific drug.

D. The consequences of a confirmed positive test result or refusal to be tested, including disciplinary action.

E. The availability of drug abuse counseling and referral services, including the name and telephone number of the local EAP Coordinator.

SECTION 6. *NOTIFICATION TO APPLICANTS FOR POSITIONS SUBJECT TO TESTING.*

A. Vacancy announcements for Category I positions shall contain information that the applicant will be tested for illegal drug use prior to appointment.

B. Applicants will be advised of the opportunity to submit medical documentation that may support

a legitimate use for a specific drug and that such information will be reviewed only by the MRO to determine whether the individual is using illegal drugs.

SECTION 7. *COLLECTION SITES.*

A. The designated collection site is the place where employees and applicants present themselves for the purpose of providing urine specimens to be analyzed for illegal drug use. The site must possess all necessary personnel, materials, equipment, facilities, and supervision to provide for the collection, security, temporary storage, and transportation (shipping) of urine specimens to a drug testing laboratory required by HHS guidelines.

B. Procedures must provide for the collection site to be secure. A collection site facility dedicated solely to urine collection shall be secure at all times. In cases where a facility cannot be dedicated solely for the purpose of drug testing, the portion of the facility being used for testing shall be secured during drug testing operations. Chain of custody forms must be properly executed by the collector upon receipt of specimens. The handling and transportation of urine specimens from one authorized individual or place to another must always be accomplished through the use of chain of custody procedures. No unauthorized personnel shall be permitted in any part of the collection site where urine specimens are collected or temporarily stored.

C. Employees will be asked by an appropriate management official to report to a collection site. Convenience to the employee, as well as the facilitation of the collection process, will be considered in determining the collection site.

D. Applicants will be directed to report to the nearest collection site. Applicants in remote locations will be reimbursed for reasonable expenses incurred in travel to the collection location.

SECTION 8. *SPECIMEN COLLECTION PROCESS.*

The procedures contained in this directive were designed to provide consideration for individual privacy in conjunction with a controlled drug testing program. The procedures set out below apply to all seven types of testing, i.e., random, periodic, reasonable suspicion, pre-employment/pre-appointment, accident or unsafe practice, voluntary and follow-up.

A. Chain of Custody.

(1) In order to ensure that the urine sample taken from an individual is properly identified and not accidently confused with any other sample, strict procedures shall be used when collecting and transferring the sample. The total of the procedures, i.e., the official transfers from the individual providing the sample to the drug testing laboratory, including storage of confirmed positive samples at the laboratory, is known as the chain of custody.

(2) While performing any part of the chain of custody procedures, it is essential that the urine specimen and chain of custody documents be under the control of the collector. The collector may not leave his or her work station, even momentarily, without securing the specimen and chain of custody form. The specimen should be packaged for mailing before the collector leaves the site.

(3) Collectors shall always have the container or specimen bottle within sight before and af-

ter the individual has urinated. The container shall be tightly capped, properly sealed, and labeled. The chain of custody form shall be utilized for maintaining control and accountability from point of collection to final disposition of specimens. With each transfer of possession, the chain of custody form shall be dated, signed by the individual releasing the specimen, signed by the individual accepting the specimen, and the purpose for transferring possession noted. Every effort shall be made to minimize the number of persons handling the specimens.

(4) After collection of urine specimens, collectors shall arrange to ship the specimens to the drug testing laboratory. The specimen containers shall be securely sealed to eliminate the possibility of tampering. The employee and collector shall sign and date across the tape label sealing the container and ensure that the chain of custody documentation is completed and attached to each sealed container. An outer mailing wrapper or box is placed around each sealed container and sealed again with an outer custody label. Specimens may be delivered to the drug testing laboratory using either the United States Postal Service, commercial air freight, air express, or may be handcarried. It is not necessary to send specimens by registered mail.

B. Balance of Individual Privacy and Specimen Control. Collection of urine specimens must allow individual privacy unless there is reason to believe that a particular individual may alter or substitute the specimen to be provided. Precau-

tions shall be taken to ensure that a urine specimen has not been adulterated or diluted during the collection procedure and that all information on the urine bottle and in the log book can be identified as belonging to a given individual. Collection of urine specimens shall not be made under observation except in those unusual circumstances allowed in Executive Order 12564 and Office of Personnel Management FPM Letters 792-16 and 792-17.

C. Collection Procedures. To ensure that strict chain of custody is maintained, the following procedures will be used during the collection of urine specimens:

(1) The collection process will usually be scheduled as close to the start of a work shift as possible.

(2) Upon arrival at the collection site, the collector shall request the individual to present some type of photo identification. If the individual does not have proper identification, this shall be noted on the chain of custody form. Failure to provide identification will be considered failure to cooperate and grounds for possible disciplinary action. Acceptable forms of identification include:

Employee identification with photo
Driver's license with photo
School identification card with photo

(3) If the individual fails to appear at the assigned time, the collector shall contact the Drug Program Coordinator to obtain guidance on action to be taken.

(4) The individual will be asked to fill out a pre-test information form which serves as

an identification document for the urine sample collected. This form will also elicit information regarding prescription and non-prescription drugs an employee uses which may affect the outcome of the test.

(5) The collector shall ask the individual to remove any unnecessary outer garments (e.g., coat, jacket) that might conceal items or substances that could be used to tamper with or adulterate his or her urine specimen. Also, all personal belongings (e.g., purse, briefcase) must remain with outer garments; the individual may, however, retain his or her wallet. The collector shall note on the chain of custody form any unusual behavior or appearance.

(6) The individual shall be instructed to wash and dry his or her hands prior to urination. After washing hands, he or she shall remain in the presence of the collector and not have access to water fountains, faucets, soap dispensers, or cleaning agents or any other materials which could be used to adulterate the specimen.

(7) To deter the dilution of specimens at the collection site, toilet bluing agents shall be placed in the toilet tanks, wherever possible, so the reservoir of water in the toilet bowl always remain blue. There should not be any other source of water (e.g., shower, sink, etc.) in the enclosure where urination occurs.

(8) The individual may provide his or her specimen in the privacy of a stall, or otherwise partitioned area that allows for individual privacy. The collector shall note on the chain

of custody form any unusual behavior by the individual.

(9) The individual shall be asked to void into a disposable specimen container and asked not to flush the toilet until the specimen has been handed over to the collector. The individual may then flush the toilet and should then observe the collector complete the chain of custody procedure. With regard to females, a collection container with a wider mouth may be used to collect the urine and the sample is then transferred by the collector to the specimen container. Any transfer of urine from the collection container to the specimen bottle should be observed by the individual.

(10) If the collection site is a public restroom, a collector of the same gender as the individual shall accompany the individual into the public restroom which must be secured during the collection procedure. Toilet bluing should be placed into the toilet bowl. The collector remains in the restroom but outside the stall until the urine specimen is collected.

(11) Upon receiving the specimen from the individual, the collector will determine that it contains at least 60 milliliters of urine. If there is not sufficient urine in the container, additional urine should be collected. The individual shall be asked to drink fluids to facilitate urination (e.g., a glass of water). Employees will remain at the test site for approximately 2 hours until a urine specimen is provided. The inability of an employee to provide the necessary specimen will be treated as a refusal. The collector shall contact the Drug Program Coordinator to obtain guidance on action to be taken.

(12) After the specimen has been provided and submitted to the collector, the individual should be allowed to wash his or her hands.

(13) Immediately after collection, the collector shall measure the temperature of the specimen and conduct an inspection to determine the specimen's color and signs of contaminants. Any unusual findings resulting from the inspection must be included on the chain of custody form. The time from urination to delivery of the sample for temperature measurement is critical and in no case shall exceed 4 minutes. If the temperature of the specimen is outside the range of 32.5-37.7°C/90.5-99.8°F this gives rise to reason to believe the specimen has been tampered with. Another specimen shall be collected under direct observation and both specimens forwarded to the laboratory. Any specimen suspected to be adulterated should always be forwarded for testing.

(14) Both the individual being tested and the collector should keep the specimen in view at all times until it has been packaged and sealed for shipment. If the specimen is transferred to a second container, the collector shall request the individual to observe the transfer of the specimen and the placement of the tamperproof seal over the bottle cap and down the sides of the bottle. The collector will place the identification label securely on the bottle.

(15) The identification label should contain the date and individual's specimen number. The individual shall initial the label on the specimen bottle.

(16) The collector will enter the identifying information in a ledger. Both the collector and the individual shall sign the ledger next to the identifying information.

(17) The individual shall be asked to read and sign a certification statement certifying that the urine in the bottle came from his or her body at the time of testing. Refusal to sign this statement shall be noted on the statement form by the collector.

(18) The collector shall complete the appropriate chain of custody form.

(19) The urine sample and the chain of custody form are now ready for shipment. If the specimen is not immediately prepared for shipment, it must be appropriately secured during temporary storage. In no instance, shall the specimen be stored longer than 24 hours after collection.

SECTION 9. *LABORATORY ANALYSIS PROCEDURES.*

A. Policy.

(1) All laboratory testing and laboratory chain of custody procedures will be done in strict accordance with the HHS "Scientific and Technical Guidelines for Drug Testing Programs."

(2) The test for drugs will consist of initial screening to detect the presence of drugs and confirmation testing of samples where an initial screen is positive.

(3) The laboratory will assure the chain of custody procedures are adhered to from the time of receipt of urine samples until test-

ing is completed, results reported, and while specimens are in storage.

B. Reporting Test Results to the MRO. Test results shall be reported to a designated MRO within five working days of receipt at the laboratory of the specimens. The report should contain the assigned specimen number, the drug testing laboratory number, and results of the drug tests. All specimens negative on initial test or negative on the confirmatory test *shall be reported as negative.* Only specimens confirmed positive shall be reported positive to the MRO. Results shall be transmitted to the MRO in a manner consistent with the Privacy Act. It is not permitted to provide results verbally by telephone. A certified copy of the original chain of custody form, signed by the laboratory director or laboratory certifying official, shall be sent to the MRO. Copies of all analytical results shall be available from the laboratory when requested.

C. Specimen Storage. Negative samples will be discarded by the laboratory. Only samples testing positive after both the screening and confirmation tests will be considered positive for purposes of retaining the specimen. Positive samples will be retained at the laboratory in a frozen state for at least 365 days. Within this 365-day period, the Drug Program Coordinator may request the laboratory to retain the specimen for an additional period of time. This ensures that the urine samples will be available for possible retest during any administrative or disciplinary proceeding. If the laboratory does not receive a request to retain the specimen during the initial 365-day period, the specimen may be discarded.

D. Internal/External Quality Assurance Program. In accordance with the HHS procedures, blind

samples will be randomly intermingled by DOT and the testing laboratory with individual specimen samples and analyzed in the same manner to ensure the accuracy of our laboratory testing program.

E. Independent Testing. An employee who tests positive may request a second test of the sample collected at the time of drug screening. That test may be conducted at the laboratory used by the Department or at another qualified laboratory identified by the employee. In the latter instance, the laboratory used by the Department will send a portion of the original sample to a laboratory designated by the employee. The cost of this test shall be paid by the employee. Strict chain of custody procedures will be followed for any transfer between laboratories.

SECTION 10. *REPORTING TEST RESULTS.*

A. Employees who test positive will receive written notification of the positive finding. Employees who test negative on initial screening or on confirmation will not receive written notification of the negative finding.

B. Information will be elicited from employees prior to providing urine specimens to indicate their legitimate use for a specific drug. Employees who test positive for a drug and whose pre-test information indicates the legitimate use for a specific drug causing the positive test result will be notified in writing that their test result is considered negative.

SECTION 11. *RANGE OF DRUGS.*

A. Tests will be conducted for the illegal use of the following drugs considered to be a controlled substance included in Schedule I or II, as defined by

section 802(6) of Title 21 of the United States Code, the possession of which is unlawful under Chapter 13 of that Title:

(1) Marijuana

(2) Cocaine

(3) Opiates

(4) Amphetamines

(5) Phencyclidine (PCP)

B. Before including any additional drugs (or classes of drugs), listed in Schedule I or II of the Controlled Substance Act in its testing program, the Department will petition the Secretary of HHS or his or her designee for written approval.

C. When conducting reasonable suspicion testing in accordance with Chapter III, Section 4.C., the Department may test for any drug identified in Schedule I or II of the Controlled Substance Act as set forth in Appendix B.

CHAPTER IV

REHABILITATION

SECTION 1. *GENERAL.*

When it has been determined that an employee has used illegal drugs off-duty, it is the responsibility of management to direct an employee to the Employee Assistance Program (see Chapter VII). The employee shall be given an opportunity following the initial counseling to enter a drug rehabilitation/abatement program as may be appropriate under the circumstances. (Abatement is defined as the elimination of the use of, or dependence on, a substance through the exercise of individual initiative or through the encouragement and/or support of others.) The employee will, in addition to the program determined to be appropriate, be subject to follow-up drug testing for a one-year period after return to safety or security duties or completion of the rehabilitation/abatement program, whichever is later. An employee who successfully completes such a program will not be subject to disciplinary action for the first determination of illegal drug usage.

SECTION 2. *EMPLOYEE ASSISTANCE PROGRAM.*

An employee directed to an EAP will receive short-term diagnostic counseling and referral to a rehabilitation/abatement program. Information will be provided to management in accordance with the confidentiality requirements of Chapter V.

SECTION 3. *REHABILITATION/ABATEMENT SELECTED.*

The determination of the type of rehabilitation/abatement assistance required by an employee will be made by the EAP Coordinator, in consultation as appropriate, with supervisory and medical personnel.

SECTION 4. *COST.*

The services provided under existing EAP programs are provided at no cost to the employee. However, the cost of further rehabilitative services or treatment is the responsibility of the employee.

SECTION 5. *SELF-REFERRAL.*

An employee who voluntarily identifies himself or herself as an off-duty drug user or volunteers for drug testing prior to being identified through other means, will not disciplined if he or she meets all of the following criteria:

A. Obtains counseling and completes rehabilitation.

B. Agrees to follow-up testing for a one year period after return to safety or security duties or completion of the rehabilitation/abatement program, whichever is later.

C. Thereafter refrains from using illegal drugs.

SECTION 6. *REASSIGNMENT TO OTHER DUTIES.*

Employees in Category I will be assigned non-safety or non-security duties when they are identified as having used illegal drugs. This policy will also apply during any rehabilitation program. The employee may be removed if there are no non-sensitive positions to which the employee may be transferred. However, an employee assigned to non-safety or non-security duties may be returned to safety or security duties when an appropriate authority determines such action would not pose a danger to public health or safety or the national security. Employees returned to safety or security duties are subject to follow-up testing for a 1-year period after return to safety or security duties or completion of the rehabilitation/abatement program, whichever is later.

CHAPTER V

CONFIDENTIALITY

SECTION 1. *POLICY.*

Employees and the drug testing laboratory involved in any aspect of the Departmental drug program are required to maintain strict standards of confidentiality in carrying out their responsibilities. This includes all of the following:

A. Maintaining maximum respect for individual privacy consistent with safety and security issues.

B. The handling of test results.

C. All contacts with medical and health personnel, counselors, Drug Testing Coordinators, and EAP Coordinators and administrators.

SECTION 2. *PROCEDURES TO PROTECT CONFIDENTIALITY.*

The following procedures to protect the confidentiality of negative and confirmed positive test results and related medical and rehabilitation records shall be observed.

A. Records of the identity, diagnosis, prognosis, or treatment of any employee who enters a rehabilitation/abatement program which are maintained in connection with this program are patient records that must be kept confidential and may be disclosed only by consent of the patient or under limited circumstances and specific purposes established by 42 CFR Section 2.1 *et seq.*

B. Drug abuse treatment records may be disclosed without the consent of the employee only under one of the following circumstances:

(1) To medical personnel to the extent necessary to meet a genuine medical emergency.

(2) To qualified personnel for conducting scientific research, management audits, financial audits, or program evaluation, with all identifying information removed from the data.

(3) When authorized by an appropriate court order granted after application showing good cause.

C. Any other disclosure may be made only with the written consent of the employee. Any disclosure without such consent is strictly prohibited. Such consensual disclosure may be made for verification of treatment or a general evaluation of treatment progress.

CHAPTER VI

DISCIPLINARY ACTION

SECTION 1. *GENERAL.*

Disciplinary action as set forth below will be taken under each of the described circumstances:

A. Refusal to Enter or Successfully Complete a Rehabilitation/Abatement Program. If an employee refuses to enter or successfully complete a rehabilitation/abatement program, he or she will be removed from the Federal service for illegal off-duty drug use.

B. Repeat Usage. In all cases of illegal off-duty drug use, employees who test positive a second time, or for whom a second determination of illegal drug use has been made, will be removed from the Federal service.

C. Refusal to Provide a Urine Specimen. An employee who refuses to provide a urine specimen or otherwise refuses to cooperate with the collection procedures will be removed from the Federal service.

D. Adulteration or Substitution of Specimen. An employee who adulterates, substitutes or otherwise attempts to falsify the results of a urinalysis will be removed from the Federal service.

E. On-duty Use of Illegal Drugs. On-duty use or possession of illegal drugs by an employee will result in removal from the Federal service.

F. Other Drug-related Offenses. A determination that an employee has engaged in illegal drug trafficking, e.g., sale, manufacture, growing, distribution or transportation, will result in removal from the Federal service.

SECTION 2. *DISCIPLINARY PROCEDURES.*

Any disciplinary action under this Chapter will be taken in accordance with the requirements of the Civil Service Reform Act and other governing regulations which may apply.

CHAPTER VII

EMPLOYEE ASSISTANCE PROGRAM

SECTION 1. *POLICY.*

All Operating Elements within DOT shall have an Employee Assistance Program in accordance with the regulations, policies, and procedures issued by the Department, the Office of Personnel Management (OPM), and HHS. Accordingly, all Departmental Employee Assistance Programs shall:

A. Provide the EAP with high visibility and, by utilizing a concerted publicity outreach effort, inform all employees of the purpose and operation of the program.

B. Designate an EAP Coordinator to oversee the program's operation.

C. Take appropriate steps to assure that only professional, accredited, certified, and licensed rehabilitation services are provided in connection with the EAP.

D. Have a plan to evaluate the operation of the EAP and the quality of services provided.

E. Maintain appropriate records and information systems.

F. Assure that both in-house and contracted services comply with DOT, OPM and HHS regulations and instructions.

G. Provide educational awareness programs on EAP related subjects.

SECTION 2. *ASSESSMENT AND REFERRAL.*

All Departmental EAPs must have a rehabilitation/abatement referral component which includes an up-

to-date referral source of rehabilitation/abatement organizations, the criteria used to assess the organizations and the quality of services provided, and the procedures for making a referral.

A. Developing the Referral Source.

(1) EAP Coordinators must maintain or have readily available a list of rehabilitation/abatement organizations which provide counseling and rehabilitative programs.

(2) The following information must be included on each organization: (a) name, address, and telephone number; (b) the type of services provided; (c) hours of operation, including emergency hours; (d) name and telephone number of a contact person; (e) fee structure, including insurance coverage; (f) client specialization; and (g) other pertinent information.

(3) EAP Coordinators shall establish and maintain liaison with counterparts in the employee assistance field through participation in meetings, seminars, and other appropriate professional activities.

B. Assessing Rehabilitative/Abatement Organizations and the Quality of Services.

(1) EAP Coordinators periodically shall visit rehabilitative/abatement organizations to: (a) meet administrative and staff members; (b) tour the site and observe the physical setting; and (c) ascertain the experience, certification and educational level of staff.

(2) EAP Coordinators shall verify licensing and accreditation of organizations.

(3) EAP Coordinators shall ascertain each organization's policy concerning progress reports on clients and post-treatment follow-up.

C. Developing Procedures for Making Referrals.

(1) Factors that must be considered in making a referral include: (a) the nature and severity of the problem; (b) location of the treatment center; (c) cost; (d) levels of care, i.e., the degree of restrictiveness and/or intensity of treatment environment; (e) availability of inpatient and/or out-patient care; and (f) other special needs, such as transportation and child care.

(2) Whenever possible, the employee should be involved in the selection and choice of a provider.

(3) Employees shall be allowed up to 1 hour (or more as necessitated by travel time) of excused absence for each counseling session, up to a maximum of six sessions, during the assessment/referral phase of rehabilitation. Absences during duty hours for rehabilitation/abatement must be charged to the appropriate leave category in accordance with law and leave regulations.

SECTION 3. *TRAINING.*

As supervisors have a key role in establishing and maintaining a drug-free work place, EAPs shall have a training component to assist supervisors and managers in identifying and addressing illegal drug use by employees.

A. Goals and Objectives. All supervisory training shall meet the following goals and objectives:

(1) To understand Departmental policies relevant to work performance problems, drug use, and the EAP.

(2) To understand the responsibilities of offering EAP services to employees.

(3) To recognize and document employee performance and behavioral changes.

(4) To understand the roles of the medical staff, supervisors, personnel, and EAP personnel.

(5) To understand the ways to use the EAP.

(6) To understand how the EAP is linked to the performance appraisal and the disciplinary processes.

(7) To understand the process of reintegrating employees into the work force.

(8) To be aware of legal and liability issues.

B. Requirements. All supervisory training shall meet the following requirements:

(1) Training is required of all supervisors, managers, and union representatives where appropriate.

(2) Training shall be presented as a separate course, or be included as part of ongoing supervisory training programs.

(3) Training shall be provided as soon as possible after a person assumes supervisory responsibility.

(4) The training program shall contain written material which the supervisor can utilize back at the work site.

C. Specifics of Course Outline. Training courses shall include but shall not be limited to the following segments:

(1) Overall Departmental policy.

(2) The prevalence of various employee problems, i.e., alcohol, drugs, emotional, etc.

(3) The EAP approach to handling problems.

(4) How to identify employees with possible problems.

(5) Documentation of employee performance or behavior.

(6) How to approach the employee.

(7) How to utilize the EAP.

(8) Disciplinary measures where employees decline offers of assistance or refuse to complete a rehabilitation/abatement program.

(9) The reintegration of employees into the work force.

SECTION 4. *CONTRACTING FOR EAP SERVICES.*

EAP services provided through contract shall meet the same requirements as contained in DOT, OPM and HHS regulations and instructions. In addition, the Operating Elements must ensure the contract statement of work provides all of the following:

A. A description of the services to be provided, i.e., counseling and referral, rehabilitation, publicity outreach, training, educational awareness, and program evaluation.

B. The location and availability of services.

C. The qualifications of the administrative and counseling staff.

D. The system for making a referral, i.e., criteria used to determine appropriate referral and for determining the quality of provider.

E. A contractor self-evaluation program.

F. A confidentiality provision.

G. A reporting and information system.

H. An overall program evaluation plan.

CHAPTER VIII—IMPLEMENTING PROCEDURES (RESERVED)

[DOT Logo]

Elizabeth Dole
Secretary of Transportation

APPENDIX A

CATEGORIZATION OF EMPLOYEES FOR DRUG TESTING

DEFINITIONS

Category I—Safety/Security Critical—These are positions characterized by their critical safety or security responsibilities as they relate to the mission of the Department. The job functions associated with these positions have a direct and immediate impact on public health and safety, the protection of life and property, law enforcement, or national security. These positions require the highest degree of trust and confidence.

Category II—These are positions not included in Category I.

Positions are identified for inclusion within the above categories by their organizational location, occupational series, job title, security clearance, or combinations of these characteristics.

POSITION COVERAGE BY SECURITY CLEARANCE

All positions occupied by individuals which require the possession of a security clearance of "TOP-SECRET" or higher are included in Category I regardless of their organization or occupation.

POSITION COVERAGE BY OCCUPATION

The categorization of all other Department of Transportation positions is accomplished within the context of their Operating Elements and their job duties within that administration. To assure overall consistency, category determinations for including or excluding positions from either Category I or Category II will be made by the Office of the Secretary in consultation with the Operating Elements. References to a given job, occupation series or family include all supervisors and employees in the occupation regardless of pay plan unless otherwise noted.

JUSTIFICATION STATEMENTS FOR CATEGORY I POSITIONS

Each determination by an Operating Element, OST, or OIG to include a particular job occupation in Category I shall be supported by a justification statement clearly describing why the job is safety/security critical and specifying the adverse consequences that would likely occur if an incumbent in that position were to use illegal drugs. A current justification statement for each job occupation included in Category I shall remain on file with the Assistant Secretary for Administration. The Assistant Secretary for Administration reserves the right to review each justification statement to ensure overall consistentcy with the DOT drug program and among varying occupations throughout the Department and make appropriate recommendations.

Office of the Secretary

Category I

Motor Vehicle Operators	WG-57XX

United States Coast Guard

Category I

Firefighters	GS- 81
Nurses	GS- 610
Criminal Investigators	GS-1811
Vessel Traffic Controllers	GS-2150
Marine Traffic Controllers (Pilot)	GS-2150
Electronic Mechanics	WG-2604**
Aircraft Electricians	WG-2892**
Instrument Mechanics	WG-3359**
Metals Inspectors	WG-3801**
Shipwright Foremen	WS-5220
Transportation Equipment Operation Family	WG-57XX
Aircraft Oxygen Equipment Mechanics	WG-8201**
Aircraft Engine Mechanics	WG-8602**

Aircraft Mechanics	WG-8852**
Master Pilots, Ferryboat	WM-9902
Chief, Engineers, Ferryboat	WM-9931
Oiler, Ferryboat & Diesel	WM-9961

All individuals with "competent person" collateral duties at the Coast Guard Yard, Curtis Bay, Maryland. These individuals have responsibility for certifying areas as "safe" for performing work (such as certifying fuel tanks safe for welding).

** Only those individuals located at the Aircraft Repair and Supply Center.

Federal Aviation Administration

Category I

Electronics Technicians	GS-856
Civil Aviation Security Specialists [1]	GS-1801**
Aviation Safety Inspectors	GS-1825**
Air Traffic Control Specialists	GS-2152**
Inspection/Flight Test Pilots	GS-2181
Transportation Equipment Operation Family	WG-57XX
Aircraft Mechanics	WG-8852

** Only GS-2152, GS-1801 and GS-1825 employees who are required to take periodic physical exams to retain medical clearances are covered by this program.

[1] Includes persons in other job series who perform Federal Air Marshall duties and thus require periodic physical examinations.

Federal Highway Administration

Category I

Highway Safety Specialists	GS-2125*
Motor Carrier Safety Specialists	GS-2123*
Transportation Equipment Operation Family	WG-57XX

* Includes only those GS-2123 and GS-2125 positions with day-to-day responsibilities for field operations of inspection and enforcement.

Federal Railroad Administration

Category I

Industrial Hygienists (Headquarters)	GS-690
General Engineer (Field & Headquarters)	GS-801
Civil Engineers (Field & Headquarters)	GS-810 **
Railroad Safety Series (Field & Headquarters)	GS-2121**
Motor Vehicle Operators	WG-57XX
Safety Engineer (Headquarters)	GS-803
Mechanical Engineers (Headquarters)	GS-830
Electrical Engineers (Headquarters)	GS-855
Chemical Engineer (Headquarters)	GS-893
Transportation Specialists (Headquarters)	GS-2101*

* Includes only those positions which involve two or more specialized transportation functions actively engaged in the development, implementation and monitoring of railroad safety programs.

** For field positions, includes Railroad Safety Inspectors and Specialists, Supervisory Inspectors and Specialists, managerial level Railroad Safety Specialists and Civil Engineers actively engaged in the inspection of railroad equipment and services.

Saint Lawrence Seaway Development Corporation

Category I

Lock and Dam Operators	WG-5426**
Vessel Traffic Controllers	GS-2150**
Transportation Equipment Operation Family	WG-57XX**

** Employees in other series who periodically perform the duties of Vessel Traffic Controller, Lock and Dam Operators or Heavy Equipment Operators are also included in Category I.

Urban Mass Transportation Administration

Category I

Motor Vehicle Operators	WG-57XX

National Highway Traffic Safety Administration

Category I

Motor Vehicle Operators	WG-57XX
Auto Enforcement Investigators	GS-1801
Criminal Investigators	GS-1811

Research and Special Programs Administration

Category I

General Engineer (Pipeline)	GS-801
Petroleum Engineer	GS-881
Transportation Specialists	GS-2101*
Motor Vehicle Operators	WG-57XX

* Includes those at grade 13 and above.

Office of Inspector General

Category I

Criminal Investigators	GS-1811

Maritime Administration

Category I

Transportation Equipment Operation Family	WG-57XX
Engineers (Watchstander)	WM-5352
Marine General Utility Maintenance Mechanics (Deck/Engine)	WM-5352

APPENDIX B

LISTING OF SCHEDULES I AND II CONTROLLED SUBSTANCES

The Controlled Substances Act (CSA) (21 U.S.C. ¶ 801 *et seq.*), among other things, establishes five schedules of controlled substances. Initial listings of controlled substances are indicated in section 202 of the CSA (21 U.S.C. ¶ 812). However, under the statute, the Attorney General may by rule add any drug or other substance to a schedule, remove it from the schedules or transfer it between schedules if the drug or other substance meets certain statutory criteria. The Attorney General's authority in this matter has been delegated to the Administrator, Drug Enforcement Administration (DEA), U.S. Department of Justice.

The schedules of controlled substances established by section 202 of the CSA, as changed, updated and republished from time to time, are set forth in 21 CFR Part 1308. The current Schedule I and II listings (as of April 1, 1986) are as follows:

SCHEDULES

Section 1308.11 Schedule I.

(a) Schedule I shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section. Each drug or substance has been assigned the DEA Controlled Substances Code Number set forth opposite it.

(b) Opiates. Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, salts is possible within the specific chemical designation:

(1)	Acetylmethadol	9601
(2)	Alfentanil	9737
(3)	Allylprodine	9602
(4)	Alphacetylmethadol	9603
(5)	Alphameprodine	9604
(6)	Alphamethadol	9605
(7)	Alpha-methylfentanyl (N-(1-(alpha-methyl-beta-phenyl)ethyl-4-piperidyl) propionanilide; 1-(1-methyl-2-phenylethyl)-4-(N-propanilido) piperidine)	9814
(8)	Benzethidine	9606
(9)	Betacetylmethadol	9607
(10)	Betameprodine	9608
(11)	Betamethadol	9609
(12)	Betaprodine	9611
(13)	Clonitazene	9612
(14)	Dextromoramide	9613
(15)	Diampromide	9615
(16)	Diethylthiambutene	9616
(17)	Difenoxin	9168
(18)	Dimenoxadol	9617
(19)	Dimepheptanol	9618
(20)	Dimethylthiambutene	9619
(21)	Dioxaphetyl butyrate	9621
(22)	Dipipanone	9622
(23)	Ethylmethylthiambutene	9623
(24)	Etonitazene	9624
(25)	Etoxeridine	9625
(26)	Furethidine	9626
(27)	Hydroxypethidine	9627
(28)	Ketobemidone	9628
(29)	Levomoramide	9629
(30)	Levophenacylmorphan	9631
(31)	Morpheridine	9632
(32)	Noracymethadol	9633
(33)	Norlevorphanol	9634

(34)	Normethadone	9635
(35)	Norpipanone	9636
(36)	Phenadoxone	9637
(37)	Phenampromide	9638
(38)	Phenomorphan	9647
(39)	Phenoperidine	9641
(40)	Piritramide	9642
(41)	Proheptazine	9643
(42)	Properidine	9644
(43)	Propiram	9649
(44)	Racemoramide	9645
(45)	Tilidine	9750
(46)	Trimeperidine	9646

(c) Opium derivatives. Unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1)	Acetorphine	9319
(2)	Acetyldihydrocodeine	9051
(3)	Benzylmorphine	9052
(4)	Codeine methylbromide	9070
(5)	Codeine-N-Oxide	9053
(6)	Cyprenorphine	9054
(7)	Desomorphine	9055
(8)	Dihydromorphine	9145
(9)	Drotebanol	9335
(10)	Etorphine (except hydrochloride salt)	9056
(11)	Heroin	9200
(12)	Hydromorphinol	9301
(13)	Methyldesorphine	9302
(14)	Methyldihydromorphine	9304
(15)	Morphine methylbromide	9305
(16)	Morphine methylsulfonate	9306

(17)	Morphine-N-Oxide	9307
(18)	Myrophine	9308
(19)	Nicocodeine	9309
(20)	Nicomorphine	9312
(21)	Normorphine	9313
(22)	Pholcodine	9314
(23)	Thebacon	9315

(d) Hallucinogenic substances. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation (for purposes of this paragraph only, the term "isomer" includes the optical, position and geometric isomers):

(1)	4-bromo-2, 5-dimethoxy-amphetamine Some trade or other names: 4-bromo-2,5-dimethoxy-alpha-methylphenethylamine; 4-bromo-2,5-DMA	7391
(2)	2,5-dimethoxyamphetamine Some trade or other names; 2,5-dimethoxy-alpha-methylphenethylamine; 2,5-DMA	7396
(3)	4-methoxyamphetamine Some trade or other names: 4-methoxy-alpha-methyl-phenethylamine; paramethoxyamphetamine, PMA	7411
(4)	5-methoxy-3,4-methylenedioxy-amphetamine	7401
(5)	4-methyl-2,5-dimethoxy-amphetamine Some trade and other names: 4-methyl-2,5-dimethoxy-alpha-methylphenethylamine; "DOM"; and "STP"	7395
(6)	3,4-methylenedioxy amphetamine	7400
(7)	3,4,5-trimethoxy amphetamine	7390

(8)	Bufotenine Some trade and other names: 3-(beta-Dimethylaminoethyl)-5-hydroxyindole; 3-(2-dimethylaminoethyl)-5-indolol; N, N-dimethylserotonin; 5-hydroxy-N,N-dimethyltryptamine; mappine	7433
(9)	Diethyltryptamine Some trade and other names: N,N-Diethyltryptamine; DET	7434
(10)	Dimethyltryptamine Some trade or other names: DMT	7435
(1)	Ibogaine Some trade and other names: 7-Ethyl-6,6 beta, 7,8,9,10,12,13-octahydro-2-methoxy 6,9-methano-5H-pyrido (1', 2':1,2) azepino (5,4-b) indole; Tabernanthe iboga	7260
(12)	Lysergic acid diethylamine	7315
(13)	Marihuana	7360
(14)	Mescaline	7381
(15)	Parahexyl Some trade or other names: 3-Hexyl-1-hydroxy-7,8,9,10-tetrahydro-6,6,9-trimethyl-6H-dibenzo(b,d) pyran; Synhexyl	7374
(16)	Peyote Meaning all parts of the plant presently classified botanically as Lophophora williamsii Lemaire, whether growing or not, the seeds thereof, any extract from any part of such plant, and every compound, manufacture, salts, derivative, mixture, or preparation of such plant, its seeds or extracts. (Interprets 21 USC 812(c), Schedule 1(c)(12))	7415
(17)	N-ethyl-3-piperidyl benzilate	7482
(18)	N-methyl-3-piperidyl benzilate	7484
(19)	Psilocybin	7437

(20) Psilocyn 7438

(21) Tetrahydrocannabinols 7370
Synthetic equivalents of the substances contained in the plant, or in the resinous extractives of Cannabis, sp. and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity such as the following.

Delta 1 cis or trans tetrahydrocannabinol, and their optical isomers.
Delta 6 cis or trans tetrahydrocannabinol, and their optical isomers.
Delta 3,4 cis or trans tetrahydrocannabinol, and its optical isomers.
(Since nomenclature of these substances is not internationally standardized, compounds of these structures, regardless of numerical designation of atomic positions covered.)

(22) Ethylamine analog of phencyclidine 7455
Some trade or other names: N-ethyl-1-phenylcyclohexylamine, (1-phenylcyclohexyl) ethylamine, N-(1-phenylcyclo-hexyl) ethylamine, cyclohexamine, PCE

(23) Pyrrolidine analog of phencyclidine 7458
Some trade or other names: 1-(1-phenylcyclohexyl)-pyrrolidine, PCPy, PHP

(24) Thiophene analogy of phencyclidine 7470
Some trade or other names: 1-(1-(2-thienyl)-cyclohexyl)-piperidine, 2-thienylanalog of phencyclidine, TPCP, TCP

(e) Depressants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the

existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Mecloqualone	2572
(2) Methaqualone	2565

(f) Stimulants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contain any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers, and salts of isomers:

(1) Fenethylline	1503
(2) N-ethylamphetamine	1475

(g) Temporary listing of substances subject to emergency scheduling. Any material, compound, mixture or preparation which contains any quantity of the following substances:

(1) 3-Methylfentanyl (N-(3-methyl-1-(2-phenylethyl)-4-piperidyl)-N-phenylprpanamide), its optical and geometric isomers, salts and salts of isomers	9813
(2) 3,4-methylenedioxymethamphetamine (MDMA), its optical, positional and geometric isomers, salts and salts of isomers	7405
(3) 1-methyl-4-phenyl-4-propionoxypiperidine (MPPP), its optical isomers, salts and salts of isomers	9661
(4) 1-(2-phenylethyl)-4-phenyl-4-acetyloxypiperidine (PEPAP), its optical isomers, salts and salts of isomers	9663
(5) N-(1-(1-methyl-2-phenyl)ethyl-4-piperidyl)-N-phenylacetamide (acetyl-alpha-methylfentanyl), its optical isomers, salts and salts of isomers	9815
(6) N-(1-(1-methyl-2-(2-thienyl)ethyl-4-piperidyl)-N-phenylpropanamide (alpha-methylthiofentanyl), its optical isomers, salts and salts of isomers	9832

(7) N-(1-benzyl-4-piperidyl)-N-phenylpropanamide (benzylfentanyl), its optical isomers, salts and salts of isomers 9818

(8) N-(1-(2-hydroxy-2-phenyl)ethyl-4-piperidyl)-N-phenylpropanamide (beta-hydroxyfentanyl), its optical isomers, salts and salts of isomers 9830

(9) N-(3-methyl-1-(2-hydroxy-2-phenyl)ethyl-4-piperidyl)-N-phenylpropanamide (beta-hydroxy-3-methylfentanyl), its optical and geometric isomers, salts and salts of isomers 9831

(10) N-(3-methyl-1-2-(2-thienyl)ethyl-4-piperidyl)-N-phenylpropanamide (3-methylthiofentanyl), its optical and geometric isomers, salts and salts of isomers 9833

(11) N-(1-(2-thienyl)methyl-4-piperidyl)-N-phenylpropanamide (thenylfentanyl), its optical isomers, salts and salts of isomers 9834

(12) N-(1-(2-(2-thienyl)ethyl-4-piperidyl)-N-phenylpropanamide (thiofentanyl), its optical isomers, salts and salts of isomers 9835

(13) N-(1-(2-phenylethyl)-4piperidyl)-N-(4-fluorophenyl)-propanamide (para-fluorofentanyl), its optical isomers, salts and salts of isomers 9812

Section 1308.12 Schedule II.

(a) Schedule II shall consist of the drugs and other substances by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section. Each drug or substance has been assigned the Controlled Substances Code Number set forth opposite it.

(b) Substances, vegetable origin or chemical synthesis. Unless specifically excepted or unless listed in another schedule, any of the following substances

whether produced directly or indirectly by extraction from substances or vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate excluding apomorphine, dextrorphan, nalbuphine, nalmefene, naloxone, and naltrexone, and their respective salts, but including the following:

(1) Raw Opium	9600
(2) Opium extracts	9610
(3) Opium fluid	9620
(4) Powdered opium	9639
(5) Granulated opium	9640
(6) Tincture of opium	9630
(7) Codeine	9050
(8) Ethylmorphine	9190
(9) Etorphine hydrochloride	9050
(10) Hydrocodone	9183
(11) Hydromorphone	9150
(12) Metopon	9280
(13) Morphine	9300
(14) Oxycodone	9143
(15) Oxymorphone	9652
(16) Thebaine	9333

(2) Any salt, compound, derivative, or preparative thereof which is chemically equivalent or identical with any of the substances referred to in paragraph (b)(1) of this section, except that these substances shall not include the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

*(4) Coca leaves (9040) and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine (9041) or ecogonine (9180).

(5) Concentrate of poppy straw (the crude extract of poppy straw in either liquid, solid or powder form which contains the phenanthrene alkaloids of the opium poppy), 9670.

(c) Opiates. Unless specifically excepted or unless in another schedule any of the following opiates, including its isomers, esters, ethers, salts and salts of isomers, esters and ethers whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation, dextrorphan and levopropoxyphene excepted:

(1) Alphaprodine	9010
(2) Anileridine	9020
(3) Bezitramide	9800
(4) Bulk dextropropoxyphene (non-dosage forms)	9273
(5) Dihydrocodeine	9120

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* The Drug and Alcohol Dependent Offenders Treatment Act of 1986, P.L. 99-570, Title I, Subtitle Q, amends subsection (a)(4) of section 202(c) of the CSA (21 U.S.C. 812) as follows:

"(4) Coca leaves (except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and the derivatives of or their salts have been removed); cocaine, its salts, optical and geometric isomers, and salts of isomers; and, its derivatives, their salts, isomers, and salts of isomers."

To date, 21 CFR Section 1308.12(b) (4) has not been revised to reflect this legislative amendment.

(6)	Diphenoxylate	9170
(7)	Fentanyl	9801
(8)	Isomethadone	9226
(9)	Levomethorphan	9210
(10)	Levorphanol	9220
(11)	Metazocine	9240
(12)	Methadone	9250
(13)	Methadone-Intermediate, 4-cyano-2-dimethylamino-4,4-diphenyl butane	9254
(14)	Moramide-Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid	9802
(15)	Pethidine (meperidine)	9230
(16)	Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine	9232
(17)	Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate	9233
(18)	Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid	9234
(19)	Phenazocine	9715
(20)	Piminodine	9730
(21)	Racemethorphan	9732
(22)	Racemorphan	9733
(23)	Sufentanil	9740

(d) Stimulants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1)	Amphetamine, its salts, optical isomers, and salts of its optical isomer	1100
(2)	Methamphetamine, its salts, isomers, and salts of its isomers	1105
(3)	Phenmetrazine and its salts	1631
(4)	Methylphenidate	1724

(e) Depressants. Unless specifically excepted or unless listed in another schedule any material compound mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Amobarbital	2125
(2) Pentobarbital	2270
(3) Phencyclidine	7471
(4) Secobarbital	2315

(f) Immediate precursors. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances:

(1) Immediate precursor to amphetamine and methamphetamine:

(i) Phenylacetone 8501
Some trade or other names: phenyl-2-propanone; P2P; benzyl methyl ketone; methyl benzyl ketone;

(2) Immediate precursors to phencyclidine (PCP):

(i) 1-phenylcyclohexylamine 7460

(ii) 1-piperidinocyclohexanecarbonitrile (PCC) 8603

No. 89-1272

In the Supreme Court of the United States

OCTOBER TERM, 1989

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL., PETITIONERS

v.

SAMUEL K. SKINNER, SECRETARY OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment prohibits random drug testing of employees of the Department of Transportation whose positions bear "a direct and immediate impact on public health and safety, the protection of life and property, law enforcement, or national security."

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-28a) is reported at 885 F.2d 884. The opinion of the district court (Pet. App. 29a-37a) is reported at 670 F. Supp. 445.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1989. On November 28, 1989, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 8, 1990. On December 28, 1989, the Chief Justice further extended the time for filing a petition to and including February 7, 1990, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 29, 1987, the Secretary of Transportation announced a plan for testing employees of the Department of Transportation for unlawful drug use. Employees may be subjected to urinalysis in one or more of seven circumstances.[1] Those employed in "Category I" positions – whose positions bear "a direct and immediate impact on public health and safety, the protection of life and property, law enforcement, or national security" (Pet. App. 4a) – may be required to submit to random testing. Those positions principally include air traffic controllers – a group that is not party to these proceedings – but also include aviation safety inspectors, motor carrier and highway safety specialists, railroad safety inspectors, civil aviation security specialists, aircraft mechanics, and motor vehicle operators. *Id.* at 2a, 4a-5a.

Petitioners, labor organizations and certain Category I employees, brought this action, alleging that the Department's drug-testing program was unconstitutional under the Fourth and Fifth Amendments, and that it violated certain federal statutes. The district court upheld the program (Pet. App. 29a-37a), concluding that "the preponderance of the proof supports the reasonableness of the random plan" (*id.* at 36a). The court explained that the Department's "duty to assure the integrity of its sensitive aviation and other critical jobs and to protect the public safety is undisputed" (*ibid.*). Moreover, the court observed, "[t]he plan reflects a high degree of concern for employee privacy interests and is carefully tailored to assure a minimum of intrusion" (*ibid.*). The court accordingly concluded that "[t]he plan

[1] At all times pertinent to this case, the categories of drug testing under the plan included: (1) random; (2) periodic; (3) reasonable suspicion; (4) pre-employment/pre-appointment; (5) accident or unsafe practice; (6) voluntary; and (7) follow-up. Pet. App. 2a n.1.

must be sustained" against petitioners' "generalized facial attack" (*ibid.*).[2]

2. The court of appeals affirmed (Pet. App. 1a-28a). Applying this Court's decisions in *National Treasury Employees Union* v. *Von Raab*, 109 S. Ct. 1384 (1989), and *Skinner* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989), the court explained that "the testing plan serves needs other than law enforcement, and therefore need not necessarily be supported by any level of particularized suspicion." Pet. App. 9a. Instead, the court continued, "[i]n order to determine the appropriate standard of reasonableness" under the Fourth Amendment, a court must "balance the individual[s'] privacy expectations against the Government's interest to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Id.* at 9a-10a.

Applying that standard, the court concluded that the Department's random drug-testing program is reasonable. On the one hand, the court noted, "the record amply evidences the extraordinary safety sensitivity of the bulk of the covered positions"—including the three categories of employees that petitioners had singled out for criticism. Pet. App. 11a. On the other hand, the court concluded that ran-

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[2] In reaching that conclusion, the district court rejected the contention that three of the positions to which the Department's drug-testing plan extends—mail van operators, railroad hazardous material inspectors, and aircraft mechanics—are "noncritical," thus demonstrating the overall unreasonableness of the testing program. Pet. App. 35a & n.10. The court found that mail van operators have security clearances and carry classified documents; that aircraft mechanics are involved in the installation, inspection and maintenance of aviation equipment and that their failure "could result in an aircraft crash"; and that railroad inspectors are "exposed to poisonous, explosive, and highly flammable commodities that could be leaking from rail cars or containers, or suddenly ignited by improper handling." *Id.* at 35a n.10.

dom testing does not unduly intrude on privacy expectations. The court explained that "[w]hile it is true that random testing may increase employee anxiety and the invasion of subjective expectations of privacy, it also limits discretion in the selection process and presumably enhances drug-use deterrence." *Id.* at 13a. The court also noted that the covered employees work in settings in which there is, in any event, "a diminished expectation of privacy" concerning "information relating to the physical condition of covered employees." *Id.* at 18a.

ARGUMENT

Petitioners broadly contend (Pet. 7-14) that random drug-testing is a per se violation of the Fourth Amendment. Relatedly, they assert (Pet. 15-17) that the circuit courts have uniformly failed to appreciate the unusually intrusive nature of random testing. There is no merit to those contentions. The court of appeals' decision – approving the Department's random testing program – is faithful to the principles articulated by this Court in *Skinner* and *Von Raab*, and six circuits, including the court below, have rejected petitioners' contrary view. Further review is therefore unwarranted.

1. Petitioners contend that random testing is so intrusive that it cannot be consistent with the Fourth Amendment – regardless of the safety or security considerations that it might serve, or the other job-related circumstances that might have reduced the employee's expectation of privacy. However, six circuits have now upheld programs providing for random drug testing against similar Fourth Amendment claims. See *Guiney* v. *Roache*, 873 F.2d 1557 (1st Cir.) (Boston police officers required to carry firearms), cert. denied, 110 S. Ct. 404 (1989); *Transport Workers' Union, Local 234* v. *Southeastern Pa. Transp. Auth.*, 884 F.2d 709 (3d Cir. 1989) (public transit employees); *Thomson* v.

Marsh, 884 F.2d 113 (4th Cir. 1989) (Army civilian employees with access to chemical warfare materiel); *Taylor* v. *O'Grady*, 888 F.2d 1189 (7th Cir. 1989) (correctional officers in regular contact with prisoners); *Rushton* v. *Nebraska Pub. Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (nuclear power plant employees); *National Fed'n of Fed. Employees* v. *Cheney*, 884 F.2d 603 (D.C. Cir. 1989) (Army civilian employees who fly and service aircraft, who occupy law enforcement positions, or who provide drug counselling), cert. denied, 110 S. Ct. 864 (1990); *Harmon* v. *Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (Department of Justice lawyers with top secret security clearances), cert. denied, 110 S. Ct. 865 (1990).

Except for *Rushton*, which was cited with approval in *Skinner*, 109 S. Ct. at 1419, all of these decisions were issued after this Court's decisions in *Von Raab* and *Skinner*. Notwithstanding the fact that the programs at issue provided for *random* testing, the courts uniformly applied the balancing approach outlined by this Court last Term, which requires a court to weigh "the public interest in the * * * testing program against the privacy concerns implicated by the tests, * * * to assess whether the tests required * * * are reasonable." *Von Raab*, 109 S. Ct. at 1397. None of the courts suggested that random testing is governed by a different legal standard under the Fourth Amendment.

2. Contrary to petitioners' suggestion (Pet. 15-17), the courts of appeals have not ignored the particular nature of random testing in undertaking the balancing required by the Fourth Amendment. Indeed, the District of Columbia Circuit has acknowledged that the random nature of the agency testing is a "relevant consideration" that might "tip the scales" in a particularly close case. *Harmon* v. *Thornburgh*, 878 F.2d at 489 (emphasis omitted). But as the court below pointed out, the randomness feature weighs on both sides of the scale: "While it is true that random testing may

increase employee anxiety and the invasion of subjective expectations of privacy, it also limits discretion in the selection process and presumably enhances drug-use deterrence." Pet. App. 13a. In any event, the courts of appeals have uniformly rejected the contention that random testing calls for a fundamentally different constitutional analysis.

Petitioners also contend (Pet. 10-11) that random testing cannot be squared with this Court's observation in *Skinner*, 109 S. Ct. at 1417, that a search may be reasonable without individualized suspicion "where the privacy interests implicated by the search are minimal." But there is no conflict with *Skinner*. Random testing involves no greater physical restraint on the individuals tested than the program in *Skinner*. What is more, nothing in this Court's decisions suggests that an employee has a fundamentally greater expectation in avoiding random testing than the types of testing at issue in this Court's cases. Moreover, while an employee will not receive notice of the particular date on which a random test will be taken, the employee must be provided with advance notice that random testing will occur at some date.[3] The notice requirement mitigates any tendency of the program to engender "concern or even fright," *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 558 (1976), and provides "visible evidence, reassuring to law-

[3] Executive Order No. 12,564, 3 C.F.R. 224, 226 (1986 Comp.), requires agencies to give their employees 60 days' notice before a drug testing program is implemented. In addition, employees who are subject to random testing must receive another notice, not less than 30 days before testing begins. FPM Letter 792-19, § 4.b, 54 Fed. Reg. 47,331 (1989).

To be sure, the particular time or date of the random test is kept a surprise, in order to deny employees who use drugs an opportunity to defeat the purpose of the tests by abstaining for a period of time. However, that degree of "surprise" is no different from that contemplated by the random checkpoint stops to which the Court alluded in *Delaware* v. *Prouse*, 440 U.S. 648, 663 (1979).

abiding" employees, that the random tests are "duly authorized and believed to serve the public interest." *Id.* at 559.

In short, random testing is not so inherently intrusive that it constitutes a per se violation of the Fourth Amendment. Rather, as the court of appeals held, random programs should be analyzed within the framework established by this Court in *Skinner* and *Von Raab*. The court below applied precisely that framework, and petitioners offer no basis for believing that it did so incorrectly.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1990

* The Solicitor General is disqualified in this case.

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No. 89-~~1271~~

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SAMUEL K. SKINNER,
SECRETARY OF TRANSPORTATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY BRIEF

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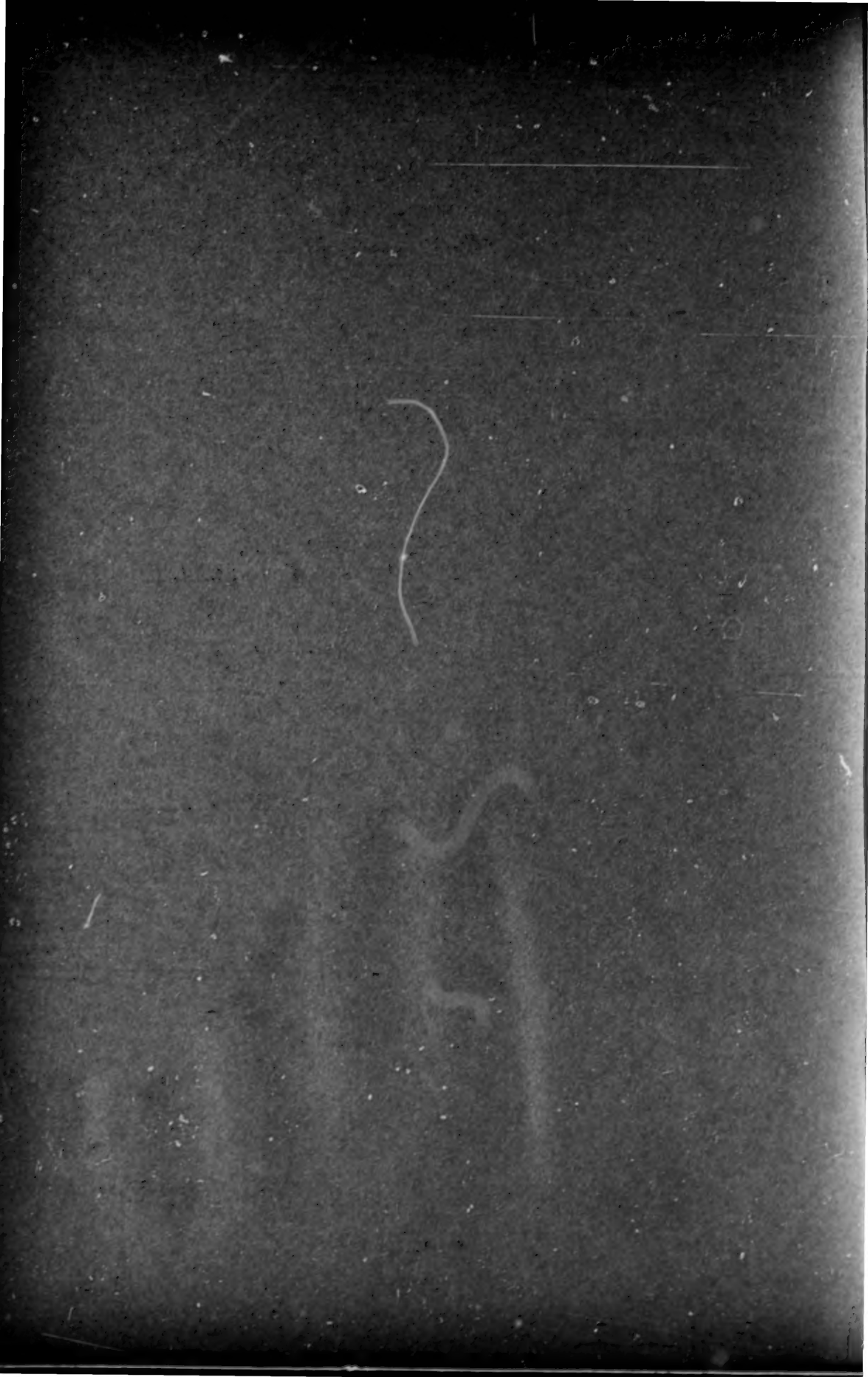

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v.

SAMUEL K. SKINNER,
SECRETARY OF TRANSPORTATION,
Respondent.

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PETITIONERS' REPLY BRIEF

ARGUMENT

1. Under this Court's jurisprudence the constitutionality of *suspicionless* search programs turns on whether the program—in its particulars and in its context—can properly be characterized as "minimally intrusive" into an individual's legitimate privacy interests.[1] In our peti-

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[1] *See, e.g., Skinner v. Railway Labor Executives' Association*, —— U.S. ——, 57 L.W. 4324, 4330 (March 21, 1989) (noting that it is a precondition to a suspicionless search program's validity that "privacy interests implicated . . . are minimal"); *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985) ("exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated are minimal"); *see also National*

tion for *certiorari* ("Pet."), we demonstrated that, by any fair assessment, drug-testing programs that subject innocent employees to permanent regimes of recurring, random, unannounced, and closely-monitored urine collection drug testing at the insistence of the state—such as the program at issue here—are far more intrusive than the searches this Court has denominated "minimally intrusive". Pet. 11-14.

The government's brief ("Gov. Br.") responds to our showing in this regard in a half page discussion which argues two essentially irrelevant points. Gov. Br. 6.

First, the government asserts that each urine test at issue, if evaluated in isolation, "involves no greater physical restraint . . . than the [post-accident testing] in *Skinner*." *Id.* This carefully ignores that the "intrusiveness" determination requires an assessment of the overall levels of anxiety, fear, annoyance and other "subjective" or "psychological intrusions" into privacy and dignity generated by the program as a whole, and not only an assessment of the objective "physical restraint" worked by the test itself.[2] Indeed, *Skinner* recognizes that precisely because urine testing programs "require employees to perform an excretory function traditionally shielded by great privacy", such searches will "not be characterize[d] . . . as minimal in most contexts". 57 L.W. at 4330 (emphasis added). And the difference between the program here and the one in *Skinner* is that the program here works a far deeper psychological intrusion on pri-

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Treasury Employees Union v. von Raab, —— U.S. ——, 57 L.W. 4338, 4342-4343 n.2 (March 21, 1989) (noting factors which "significantly minimize [testing] program's intrusion on privacy interests").

[2] *See Delaware v. Prouse*, 440 U.S. 648, 657 (1979) (focusing on "anxiety", "fright", "annoyance"); *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-580 (1976) (focusing on levels of "concern", "surprise", and "offense"); *see also United States v. Ortiz*, 422 U.S. 891, 894-895 (1975).

vacy and is, in fact, designed and administered to create an ever-present state of apprehension. Pet. 11-14.

Second, the government asserts that the instant program is minimally intrusive because each employee is given an initial notice of the program's existence, informing her that she will be subject to state-mandated urine collections, without individualized warning or reason, for the remainder of her worklife. Gov. Br. 6 & n.3. This makes a travesty of this Court's recognition that advanced notice of a drug test may "reduc[e] to a minimum any unsettling show[] of authority that may be associated with unexpected intrusions on privacy," *von Raab*, 57 L.W. at 4342 n.2. Plainly, *von Raab* refers to a particularized notice of the time of a particular test. Nothing could better illustrate the government's total disdain for the human feelings of the covered employees than the assertion that notifying those employees that, hereafter and forever, they will be routinely made targets of "unexpected intrusions on [their] privacy", reduces rather than exacerbates the invasion of their legitimate privacy expectations.[3]

2. In ultimate terms, the government's theory of this case is as straightforward as it is fallacious: *Skinner* and *von Raab* decide that all repetitive, unannounced and random drug-testing programs of employees in safety-sensitive positions of the kind at issue here meet the Constitution's requirements.[4]

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[3] *United States v. Martinez-Fuerte* does not legitimize surprise searches if the state simply announces that it is engaged in such a practice, as the government implies. *See* Gov. Br. at 6 n.3. In *Martinez-Fuerte*, the Court noted that a fixed checkpoint stop program had reduced surprise because the checkpoint locations were well-known and because the checkpoints were clearly marked so that a motorist approaching the check point received advance warning. 428 U.S. at 558-559. Here, the program, as the government concedes, is designed to test by surprise. *See* Gov. Br. at 3.

[4] Indeed, it is only on that understanding that the government is able to defend the court of appeals decisions since *Skinner* and

But neither *Skinner* nor *von Raab* involved such drug-testing programs. And, in those cases, it was the government that was the first to note that repetitive, unannounced and random programs are far more intrusive than the programs then at issue. *See* Pet. at 9-14.

The government's facile denial of what it so recently recognized can perhaps be charitably ascribed to selective amnesia. But nothing can excuse the government's trivialization of the substantial intrusions the programs at issue here work on legitimate—indeed basic—privacy interests.

* * * *

The sum of the matter is this. In our *certiorari* petition, we said:

> In large part the legitimacy—and the moral force—of judicial review rests on the assurance that the courts in interpreting the Constitution will engage in reasoned and principled decision making. Approval of the wide-spread, highly intrusive search programs at issue here on the basis of lower court speculations on how far this Court intended to move the Fourth Amendment law in its *Skinner* and *von Raab* opinions does not, we submit, constitute such decision making.
>
> [T]he decision as to whether the government may constitutionally require that individuals who are not suspected of any wrongdoing are to be subject to random, unannounced, and repeated drug testing should not be treated as a decision arrived at *sub*

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von Raab with a blanket assertion that these decisions have "uniformly applied" the proper analysis called for by this Court. Gov. Br. 5. That blanket assertion, moreover, attempts to cover some otherwise obvious analytic sins. For example, as we pointed out in our petition, Pet. 16, the Fourth Circuit, in *Thompson v. Marsh*, 884 F.2d 113, 114 (4th Cir. 1989), validated a random testing program on the erroneous premise that the programs at issue in *Skinner* and *von Raab* were random programs. And, as we also pointed out, Pet. 18, the First Circuit, in *Guiney v. Roache*, 873 F.2d 1557 (1st Cir.), *cert. denied*, 110 S.Ct. 404 (1989), apparently decided the issue with literally *no* discussion.

> *silentio* in *Skinner* and *von Raab*. Rather, it is an open issue that should be decided by this Court after squarely confronting the unique aspects of these unprecedented testing programs. [Pet. 9.]

That argument for a clear and definitive ruling on a major Fourth Amendment issue stands unrebutted.

CONCLUSION

For the reasons stated in the petition for a writ of certiorari and in this reply brief the petition should be granted.

Respectfully submitted,

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